

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Nandor J. Vadas, Magistrate Judge

IVAN VERNORD CLEVELAND, et	)	
al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. C 07-02809 NJV
	)	
BEN CURRY, WARDEN, et al.,	)	
	)	
Defendants.	)	
	)	

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San Francisco, California  
Wednesday, November 6, 2013

**TRANSCRIPT OF PROCEEDINGS**

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I N D E X

Wednesday, November 6, 2013

PLAINTIFFS' WITNESSESPAGE VOL.CURRY, BENJAMIN

By Deposition

409 3

DEFENDANTS' WITNESSESPAGE VOL.STOLTENBERG, TODD

(SWORN)

422 3

Direct Examination by Mr. Lewis

422 3

Cross-Examination by Mr. Cunningham

434 3

Redirect Examination by Mr. Lewis

472 3

Recross-Examination by Mr. Cunningham

476 3

ABANICO, IRWIN (RECALLED)

(PREVIOUSLY SWORN)

477 3

Direct Examination by Mr. Quinn

478 3

Cross-Examination by Mr. Cunningham

494 3

E X H I B I T SPLAINTIFFS' EXHIBITSIDEN EVID VOL.

14

448 3

15

509 510 3

E X H I B I T SDEFENDANTS' EXHIBITSIDEN EVID VOL.

D

476 3

## PROCEEDINGS

Wednesday - November 6, 2013

8:53 a.m.

P R O C E E D I N G S

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(Proceedings were heard out of the presence of the jury:)

**THE COURT:** Good morning, ladies and gentlemen. I know we have the jury here -- please be seated -- so we can start promptly.

Do the defendants have something to bring up with the Court?

**MR. QUINN:** Good morning, Your Honor. Michael Quinn for the defendants.

**THE COURT:** Mr. Cunningham?

**MR. CUNNINGHAM:** Yes, sir. I'm sorry.

**MR. QUINN:** We just wanted to raise one brief issue with the Court.

During -- we plan on calling Officer Abanico in to testify, and we were going to try to demonstrate -- have him demonstrate how a clothed body search is conducted on an individual from our office; and we just want to alert the Court to that and see if the Court had any objections.

**THE COURT:** No, no objection.

**MR. QUINN:** He can to it to the lawyer, how about that?

**THE COURT:** I'm sure that will be fine. Maybe you'll want to use one of the other COs.

## PROCEEDINGS

1           **MR. QUINN:** Say that again?

2           **THE COURT:** Maybe use one of the other correctional  
3 officers.

4           **MR. QUINN:** We have an individual from our office  
5 who --

6           **THE COURT:** However you want to do that, I have no  
7 objection.

8           **MR. CUNNINGHAM:** Judge, I have a question. I'm sorry.  
9 I thought you --

10          **MR. QUINN:** Just the location of putting somebody  
11 against the wall, we were thinking maybe, so the jury could see  
12 it, maybe by the door to the -- to my left or --

13          **THE COURT:** Yeah. There's not a lot of wall space; is  
14 there?

15          **THE CLERK:** You could do it over here (indicating)?

16          **MR. QUINN:** It's away from the jury, though, over  
17 there.

18          **THE COURT:** Okay. Well, what's --

19          **MR. QUINN:** I was thinking the door.

20          **THE COURT:** All right. Yeah. That's fine. They can  
21 do it there or maybe up against the backdoor there

22 (indicating). I don't know. There's not a lot of wall space.

23          Why don't you ask them if they can see it and then we can  
24 go from there? I'll ask them if they can see it.

25          **MR. QUINN:** Okay.

## PROCEEDINGS

1           **MR. CUNNINGHAM:** From over here (indicating)?

2           **THE COURT:** From there. I'll say, "Can you all see  
3 it? If you'd like, you can move to the front row." And they  
4 can observe it, stand, and I'll tell them they're more than  
5 welcome to stand up if they like.

6           **MR. QUINN:** Okay.

7           **THE COURT:** Now, the next question is: The parties  
8 stipulated to reading the transcript of Warden Curry into the  
9 record. Does that resolve the issues regarding Warden Curry?

10          **MR. CUNNINGHAM:** Yes, Judge.

11          **MR. QUINN:** I believe so, yes.

12          **THE COURT:** All right. Thank you.

13          So we'll continue now with the --

14          **MR. CUNNINGHAM:** I have one other issue, Judge.

15          When Mr. Trask was testifying yesterday about where his  
16 signature was forged on the withdrawal of the 602, we'd like to  
17 get those documents in the record. I wonder if the Court would  
18 give us leave to recall him for just a moment before we rest  
19 and just identify the documents.

20          **THE COURT:** Would you stipulate to allow him to move  
21 those records into evidence without Mr. Trask getting back on  
22 the stand?

23          **MR. QUINN:** If we can just look at the documents  
24 beforehand.

25          **THE COURT:** All right. Why don't you look at it, and

## PROCEEDINGS

1 go ahead --

2 **MR. CUNNINGHAM:** At the break?

3 **THE COURT:** -- at the break, and you can just move  
4 them in without Mr. Trask.

5 **MR. CUNNINGHAM:** All right. Fine. Thank you.

6 **THE COURT:** All right. Why don't we move along.

7 Oh, let me ask this -- oh, before we start, plaintiff has  
8 300 -- Mr. Cunningham?

9 **MR. CUNNINGHAM:** I'm sorry, Judge.

10 **THE COURT:** Plaintiff has 340 minutes left.  
11 Defendants have 666 minutes left.

12 **MR. LEWIS:** Thank you, Your Honor.

13 **MR. CUNNINGHAM:** We have 340, is that what you're  
14 saying?

15 **THE COURT:** That's correct.

16 Do we anticipate finishing this morning?

17 **MR. LEWIS:** Yes, Your Honor.

18 **MR. QUINN:** Yes.

19 **THE COURT:** All right.

20 **MR. CUNNINGHAM:** May we get our witness on the witness  
21 stand?

22 **THE COURT:** Yes. Go ahead.

23 (Proceedings were heard in the presence of the jury:)

24 **THE COURT:** Good morning, everyone.

25 **ALL:** Good morning.

## PROCEEDINGS

1           **THE COURT:** At the conclusion of the testimony  
2 yesterday, I talked to counsel and I also talked to my staff  
3 for a moment, and it appears that we will finish with the  
4 evidence this morning, probably by the lunch break.

5           Do the parties think that that's probably accurate?

6           **MR. CUNNINGHAM:** Close, Judge.

7           **THE COURT:** All right. And here's the issue that came  
8 up:

9           In chambers we talked about the fact that we still need to  
10 settle the jury instructions and the verdict form before we can  
11 instruct you and allow the lawyers to argue their case and then  
12 allow you to go into the jury room to deliberate.

13           Rather than have you wait around here this afternoon for  
14 maybe two or three hours while we do this -- and the reason we  
15 have to wait till then to do it, is because we have to know  
16 what the evidence actually is before we can really  
17 intelligently talk about what the verdict is going to look like  
18 and what the jury instructions are going to look like. We've  
19 already done a lot of the work sort of roughing things out, but  
20 it will take a while to do that.

21           The long and short of it is, I think rather than having  
22 you sit here and wait and then maybe not even get through the  
23 instructions by the end of the day, I could release you this  
24 morning at lunchtime and then you'd come back tomorrow morning,  
25 which is still Thursday, which is well within the time that we



## CURRY - DEPOSITION TESTIMONY

1 talked about, we can instruct you, argue, and you can be in the  
2 jury room probably by 11:00 tomorrow.

3 How does that sound?

4 **ALL:** That sounds great.

5 **THE COURT:** So everybody agrees that you can be  
6 released this afternoon at lunchtime and then come back at  
7 9:00?

8 (Jurors nod heads.)

9 **THE COURT:** All right. Great. Thanks so much.

10 All right. Mr. Cunningham?

11 **MR. CUNNINGHAM:** Yes, sir.

12 **BENJAMIN CURRY,**

13 called as a witness for the Plaintiffs, having been duly sworn,  
14 was examined and testified through **DEPOSITION TESTIMONY** as  
15 follows:

16 (Transcript of deposition testimony as read by Dennis  
17 Cunningham and Douglas Lubes:)

18 **MR. CUNNINGHAM:** Judge, we were on page 81, I think,  
19 or thereabouts. I'm going to go back and just pick it up in  
20 the middle of page 81, if the Court please, at line 12,  
21 question -- are you all right, Mr. Witness?

22 **MR. LUBES:** Yes.

23 **MR. CUNNINGHAM:** All right. (reading)

24 **"Q.** The issue about the possibility that Abanico was  
25 molesting guys and there was going to be some -- there was

## CURRY - DEPOSITION TESTIMONY

1 a danger and a security problem was going to be ongoing.

2 "A. I didn't feel that Abanico's safety was imminently  
3 being jeopardized at that point. I already told you that  
4 I had some reservations about the veracity of the  
5 complaint itself. My experience with that number of names  
6 attached to the complaint and what I felt was not  
7 necessarily 150 mad guys were more likely three to four.

8 "Q. Just three or four?

9 "A. That's a speculative number. I do not believe there  
10 was 150, though.

11 "Q. What about 20 or 30?

12 "A. Counselor, I can't give you an answer to that.

13 "Q. Did --

14 "A. I do not believe there was a majority. I do not  
15 believe --

16 "Q. Majority of the 150 you mean?

17 "A. Exactly. I do not believe that there was a  
18 significant number of them either.

19 "Q. At that point did you find out whether there were any  
20 other specific complaints beside the one that everybody  
21 signed?

22 "A. I don't recall if I did or not.

23 "Q. Okay. If there had been not 3 or 4 but 15 or 20 who  
24 gave specific information, would that have caused you to  
25 question your own hypothesis?

## CURRY - DEPOSITION TESTIMONY

1       **"A.** It may have.

2       **"Q.** Is it right to say, then, that it never came to that  
3 in your recollection?

4       **"A.** I don't have information that supports 15 or 20 other  
5 individual complaints."

6           **MR. CUNNINGHAM:** All right. I'm over on page 83,  
7 middle of page, middle of the text there, line 10: (reading)

8       **"Q.** Did you set any kind of follow-up with anyone that  
9 there would be a special watch on him, Abanico, or that  
10 there would be any kind of ongoing attention to the  
11 possibility that there was something to that?

12       **"A.** The fact that I'd asked a number of questions of  
13 multiple sources, IST, the Deputy Warden, the Security  
14 Squad lieutenant --

15       **"Q.** And IST, again? I'm sorry.

16       **"A.** In-Service Training.

17       **"Q.** Okay.

18       **"A.** -- provided more than ample motivation to know that  
19 the Administration was looking at this. This wasn't, you  
20 know, that knowledge ultimately, I believe, motivated  
21 Mr. Abanico to come see me.

22       **"Q.** And is it right that that was all on his initiative,  
23 you didn't put out the word?

24       **"A.** I didn't ask to see him.

25       **"Q.** You didn't say, 'We ought to talk to this guy'?

## CURRY - DEPOSITION TESTIMONY

1       **"A.** No.

2       **"Q.** Did Biggs tell you he had talked to him?

3       **"A.** No, he did not tell me that. Mr. Biggs used to be  
4 the union chapter president here.

5       **"Q.** Uh-huh.

6       **"A.** His sources and contacts with rank and file are  
7 numerous.

8       **"Q.** Okay.

9       **"A.** The fact that he had looked into it, it would have  
10 been a shock to me that Abanico didn't know that.

11       **"Q.** Uh-huh.

12       **"A.** Fair enough. I mean, that's --

13       **"Q.** So, okay.

14       **"A.** So did I ask to see Abanico? No, I did not."

15       **MR. CUNNINGHAM:** All right. Hold up a second.

16                       (Pause in proceedings.)

17       **MR. CUNNINGHAM:** (reading)

18       **"Q.** Okay. And you don't have any knowledge of anybody  
19 saying to him, 'You ought to go and see the Warden and get  
20 this straightened out'?

21       **"A.** No, I don't, but I'm not surprised if somebody did  
22 either.

23       **"Q.** Okay. So what happened in that meeting" -- I'm  
24 sorry. We're over on page 85, now, bottom of the page --  
25 "in that meeting with Abanico? What did you say and what

## CURRY - DEPOSITION TESTIMONY

1 did he say and what did you say and what did he say?  
2 What's your best recollection of the substance of that  
3 conversation?"

4 **MR. CUNNINGHAM:** Down to line 14: (reading)

5 **"A.** Okay. Abanico came to see me; and during that  
6 conversation, he tried to explain himself in terms of why  
7 there were so many concerns about how he was doing his  
8 job, and he wanted to assure me that he was not doing  
9 anything other than doing a clothed body search the way  
10 he'd been trained to do that in the Academy.

11 "My response to him was, 'There is a lot of names on  
12 this appeal and your name in this particular situation is  
13 the only name that's coming up. So you're going to have  
14 to find a way to do your searches without creating so much  
15 hate and discontent.'

16 "And he said, 'I'm just doing it the way they taught  
17 me to do them in the Academy.'

18 "He demonstrated it to me, and by this time I was well  
19 aware of the cupping of the genitals thing; but he was  
20 earnest, and I listened to his conversation with me and I  
21 came away convinced that he was being honest with me. And  
22 I thought there must be something else going on here that  
23 I'm missing, that I'm not seeing. I began at that point  
24 to question the sources of the complaint.

25 **"Q.** And did we pin down about when it was that this

## CURRY - DEPOSITION TESTIMONY

1           happened?"

2           **MR. CUNNINGHAM:** That's at line 12, line 14:

3           (reading)

4           **"A.** I don't -- I don't have a recollection of exactly  
5           when it happened.

6           **"Q.** And would there be --

7           **"A.** In terms of the events, I'm not really sure.

8           **"Q.** Would there be some kind of record of his visit to  
9           you or that conversation?

10          **"A.** There may be a record in the Warden's office in the  
11          secretary's office. She may -- if she still has them.

12          **"Q.** Of the appointment?

13          **"A.** Yes.

14          **"Q.** You didn't write a memo about it or anything?

15          **"A.** Well, of course, not. Yeah, I meet with employees  
16          all the time. I don't write memos about my meetings with  
17          employees.

18          **MR. CUNNINGHAM:** All right. Now, down to page 88,  
19          line 2: (reading)

20          **"Q.** I need to make sure of what you do and don't remember  
21          in that regard.

22                 "When we were talking about -- earlier about the  
23                 timing, was it -- was it your recollection that this" --  
24                 the meetings we're still about -- "say, was in the first  
25                 year after you got here that you had the conversation with

## CURRY - DEPOSITION TESTIMONY

1 him?

2 "A. I don't want to respond to that because I'm not sure.

3 "Q. You can't tell, okay.

4 "A. Okay. I can tell you that the complaint came in. My  
5 first conversation was with the Deputy -- was with the  
6 Deputy Knoll about it. That led to, after her getting  
7 back to me with, 'He's just doing his job, and this is  
8 what he is being taught.'

9 "That led me to a conversation with Peterson about  
10 exactly, you know, what was being taught, which led to a  
11 conversation with the Security Squad lieutenant, you know,  
12 'What do you know about this? What are you hearing?  
13 What's going on here?' And then a conversation with  
14 Abanico.

15 "Q. Okay.

16 "A. That's kind of what I remember. I can't tell you  
17 exactly, you know, calendar day, year. I don't remember.

18 "Q. I understand."

19 MR. CUNNINGHAM: Now you're up at the top of page 89,  
20 line 1: (reading)

21 "A. But I can tell you, though, I'm pretty certain that  
22 was the sequence. I wanted to satisfy myself as to the  
23 legitimacy of the complaint itself. You know, I certainly  
24 was well aware of what my obligations were.

25 "Additionally, I believe I may have talked to Colleen

## CURRY - DEPOSITION TESTIMONY

1 one more time about it to -- just to satisfy myself; and  
2 at that point, I'm not certain, but I may have been  
3 responding to the court, to Monterey maybe, possibly.

4 "Q. I think there was some activity there, yes.

5 "A. I think there was a report submitted.

6 "Q. Okay.

7 "A. Grand Jury proceeding."

8 MR. CUNNINGHAM: Now, down on page 90, I'm at line 9:  
9 (reading)

10 "Q. Was there ever any discussion about putting him into  
11 a different job, Abanico?

12 "A. I can't tell you for -- I don't remember that. There  
13 may have been, though. Possibly. I just don't know.

14 "Q. To your knowledge he wasn't moved?

15 "A. I don't want to say to my knowledge, because I don't  
16 remember.

17 "Q. Okay.

18 "A. I don't remember, but certainly that would have been  
19 a possibility.

20 "Q. Would it have been a possibility to decide to put him  
21 in a job where he didn't have that responsibility to do  
22 clothed body searches?

23 "A. Not necessarily.

24 "Q. Okay. Did -- after the follow-up conversation with  
25 Ms. Knoll, was it ever brought back to you -- your



## CURRY - DEPOSITION TESTIMONY

1 attention again that there was a continuing problem with  
2 Abanico against -- along these same lines?

3 "A. No. The issue seemed to die really. Yeah, I don't  
4 know why, but I think we may have moved him; and I'm --

5 "Q. But do you" --

6 MR. CUNNINGHAM: Well, stop right there.

7 (Pause in proceedings.)

8 MR. CUNNINGHAM: All right. I'm all the way over now  
9 on page 110, he was shown the document: (reading)

10 "Q. Looking at the document, do you see three boxes" --

11 MR. CUNNINGHAM: I'm sorry. I'm starting at line 19,  
12 you're at line 22 -- no. I'm at line 22: (reading)

13 "Q. Looking at that document, do you see the three boxes  
14 in the first paragraph there, under the first paragraph?

15 "A. Uh-huh.

16 "Q. That's -- that's where the staff determines whether  
17 or not there will be an Internal Affairs investigation  
18 requested or whether it will be handled in-house or  
19 whether it will even be -- will even go any further.

20 "A. This is a document that's used to document the case  
21 conference between the appeals coordinator and the Chief  
22 Deputy Warden. Okay, that's what this is for.

23 "Q. Okay. And we have whoever was the -- would have been  
24 the Chief Deputy Warden's signature that's blocked out  
25 there on the left toward the bottom?

## CURRY - DEPOSITION TESTIMONY

1       **"A.** Yeah.

2       **"Q.** Okay. And here -- and this, frankly, is one of the  
3       few places I have seen it just baldly stated -- in the  
4       handwritten entry at the lines at the bottom of the page  
5       there you have the plain allegation sexual assault;  
6       correct? Right?

7       **"A.** Uh-huh. He alleges that the officer conducts sexual  
8       assault during clothed body searches.

9       **"Q.** Okay.

10      **"A.** That is the group appeal. I'm assuming this is the  
11      one that was attached to the 150 names.

12      **"Q.** I believe so.

13      **"A.** Okay.

14      **"Q.** And for the record, that's case 3011 that was brought  
15      by Cleveland; and that is, I'll represent, in the file the  
16      one that's signed by all of the names. There's two of  
17      them, I think, in that folio that's in front of you.  
18      There's all the names.

19      **"A.** Right."

20           **MR. CUNNINGHAM:** Well, okay.

21                           (Pause in proceedings.)

22           **MR. CUNNINGHAM:** Going on: (reading)

23      **"A.** This is signed off by Barker. That's" --

24           **MR. CUNNINGHAM:** Wait. Wait. Wait. No. I'm sorry.

25      Not you. Me. That's --

## CURRY - DEPOSITION TESTIMONY

1           **THE COURT:** Just read the question.

2           **MR. CUNNINGHAM:** Let me just get a question.

3                           (Pause in proceedings.)

4           **MR. CUNNINGHAM:** On page 119 at line 20: (reading)

5           **"Q.** Okay. So then -- then it would be -- it would be  
6           part of a protocol, then, that you would not review the  
7           paperwork, you would deal with the presentation that was  
8           made to you if you had to and make a decision as to  
9           whether or not to request the Internal Affairs?"

10          **MR. CUNNINGHAM:** Down to line 8 on page 120:

11                   (reading)

12          **"A.** Had I looked at it, I would have referred it to the  
13          Deputy for generation of the Internal Affairs  
14          investigation, had I felt that an IA was warranted based  
15          on the information collected, if there was enough smoke  
16          there to believe there would be a fire.

17          **"Q.** Okay.

18          **"A.** And by a fire, I mean, I want to see the twigs  
19          burning.

20          **"Q.** You want some outside people to come in and look at  
21          it?

22          **"A.** I don't want somebody's rumor off the mainline here,  
23          and I don't want somebody just signing a piece of paper in  
24          cellblock housing somewhere because they stuck it in front  
25          of them to sign. I want to know what the factual

## CURRY - DEPOSITION TESTIMONY

1 information is, what I saw, what I know. That's the  
2 information I'm interested in."

3 (Pause in proceedings.)

4 **MR. CUNNINGHAM:** Okay. Now we're over on page 129.  
5 I'm starting at line 20: (reading)

6 **"Q.** I understand that. My only question at this point is  
7 whether or not you recall, once the process that you  
8 described had occurred and you had had this last  
9 discussion with Colleen Knoll, and I think your testimony  
10 has been that it was never brought back to you again, you  
11 never again, as best you recall --

12 **"A.** Not that I recall.

13 **"Q.** -- were told that Abanico was --

14 **"A.** It never came up to me again, and which I must tell  
15 you I did kind of reaffirm my suspicions. I have to say  
16 that.

17 **"Q.** That this was meritless?

18 **"A.** Yeah, that it wasn't necessarily sexual assault as  
19 much as it -- as much as it -- was his methods and  
20 potentially some attempt to evade or hide some other  
21 activities."

22 (Pause in proceedings.)

23 **MR. CUNNINGHAM:** I'm on page 131 -- excuse me just a  
24 second here.

25 (Pause in proceedings.)

## CURRY - DEPOSITION TESTIMONY

1           **MR. CUNNINGHAM:** Question at line 7: (reading)

2           **"Q.** I'm responding to his question about whether we  
3           had --

4           **"A.** The additional complaints were never brought to my  
5           attention again."

6           **MR. CUNNINGHAM:** All right.

7                               (Pause in proceedings.)

8           **MR. CUNNINGHAM:** That's all we have, Judge.

9           **THE COURT:** All right. Thank you.

10           Let me ask defense counsel. Do you intend to read -- hold  
11           on for just a moment -- do you intend to read additional  
12           excerpts from the Curry transcript into the record?

13           **MR. QUINN:** No, Your Honor.

14           **THE COURT:** All right. Thank you. You may step down.

15                               (Mr. Lubes exiting witness stand.)

16           **THE COURT:** Do plaintiffs have further witnesses?

17           **MR. CUNNINGHAM:** No, other than the matter that I  
18           spoke to you about that we're going to have further discussion  
19           about. So we would defer -- we would rest otherwise.

20           **THE COURT:** Well, I think we agreed that that could be  
21           taken --

22           **MR. CUNNINGHAM:** Yeah. Oh, okay.

23           **THE COURT:** -- outside the presence of the jury.

24           **MR. CUNNINGHAM:** Yes. Yes, that's what I mean.

25           **THE COURT:** So plaintiffs rest?

## STOLTENBERG - DIRECT / LEWIS

1           **MR. CUNNINGHAM:** Subject to that other possible  
2 addition to the evidence, yes.

3           **THE COURT:** All right.

4           **MR. LEWIS:** Your Honor, we may have to have a quick  
5 sidebar.

6           (Sidebar conference heard but not reported.)

7           **MR. LEWIS:** Your Honor, defendant will now call  
8 Lieutenant Todd Stoltenberg.

9           **THE CLERK:** Will you please come forward and take the  
10 witness stand?

11          Raise your right hand.

12                           **TODD STOLTENBERG,**  
13 called as a witness for the Defendants, having been duly sworn,  
14 testified as follows:

15           **THE WITNESS:** I do.

16           **THE CLERK:** Please be seated.

17          Please state your full name for the Court and spell your  
18 last name.

19           **THE WITNESS:** Todd Stoltenberg, S-T-O-L-T-E-N-B-E-R-G.

20           **THE COURT:** Good morning.

21           **THE CLERK:** Thank you.

22           **THE WITNESS:** Good morning. How are you?

23                           **DIRECT EXAMINATION**

24           **BY MR. LEWIS:**

25           **Q.** Good morning, Lieutenant Stoltenberg.

1     **A.**    Good morning.

2     **Q.**    What is your current position within the California  
3    Department of Corrections and Rehabilitation?

4     **A.**    I'm the correctional lieutenant assigned to the  
5    Correctional Training Center in Galt.

6     **Q.**    And how long have you held this position at the  
7    Correctional Training Center in Galt?

8     **A.**    Since 2007.

9     **Q.**    And what are your responsibilities at the Training  
10   Academy?

11    **A.**    I'm the Office of Training Professional Development  
12   Curriculum lieutenant and the Field Training and Compliance  
13   Unit lieutenant.

14    **Q.**    And as the compliance officer and the training officer  
15   that you described, what are some of the responsibilities of  
16   that particular position?

17    **A.**    That we design the curriculum and implement it for the  
18   training both at the Academy and at the institutions.

19    **Q.**    And the curriculum that you cover, what kind of materials  
20   does that material -- or does that training pertain to?

21    **A.**    What we are mandated under Penal Code 832, the California  
22   Code of Regulations, and Title 15, and our DOM.

23    **Q.**    And by "DOM" you mean?

24    **A.**    Department Operational Manual.

25    **Q.**    And that is specific, that DOM or that Department

1 Operation Manual is specific to the California Department of  
2 Corrections and Rehabilitation?

3 A. Correct.

4 Q. Are correctional officers considered peace officers?

5 A. Yes.

6 Q. And, so, then as peace officers, do they have mandated  
7 training?

8 A. Yes, they do.

9 Q. And is that the kind of training that you're talking about  
10 under Penal Code, Section 832?

11 A. Yes. Penal Code 832 basically says, and I'm paraphrasing,  
12 that it sets the standards for our training.

13 Q. And is one of the responsibilities or duties that you have  
14 to train to involve search and seizure of persons?

15 A. Yes.

16 Q. And in the correctional setting does that include search  
17 and seizure of prisoners?

18 A. Search of inmates and their cells, their living quarters,  
19 the grounds, everything inside the institution, yes.

20 Q. And by Department Operations Manual, what is the  
21 Department Operations Manual?

22 A. It gives us our guidelines on what we're supposed to do as  
23 employees of that department.

24 Q. I'm now going to show you what has been previously marked  
25 as Defendants' Exhibit A3.



## STOLTENBERG - DIRECT / LEWIS

1           **THE COURT:** Do you have that, Lisa?

2           **THE CLERK:** Yes.

3           **BY MR. LEWIS:**

4           **Q.** Could you please look that over?

5           **A.** (Witness examines document.)

6           **Q.** Does that look familiar to you?

7           **A.** Yeah. It's the 2007 version.

8           **Q.** Is this the Department Operations Manual or an excerpt of  
9 the Department Operations Manual?

10          **A.** Yes, it is.

11          **Q.** I'd like you to look at the second page of that exhibit,  
12 and there's a section number that is titled "Searches of" --  
13 it's titled "Clothed Body Searches," and it's in the middle of  
14 the page on the right-hand side.

15          **A.** Okay.

16           **THE COURT:** Counsel, just so that we're clear, this  
17 was the excerpt of the Department manual as it was in effect in  
18 2007; right?

19           **THE WITNESS:** Correct.

20           **THE COURT:** Okay.

21           **MR. LEWIS:** Yes, Your Honor.

22          **Q.** And, Lieutenant Stoltenberg, the manual is updated -- in  
23 your experience, is the Department Operations Manual updated  
24 regularly?

25          **A.** Annually.

1 Q. So, then, this version that's in 2007, that had been  
2 revised in 2007, does it -- it goes back in time as well as  
3 forward in time, so it includes information or regulations that  
4 existed in 2006 but then were updated in 2007?

5 A. Correct.

6 Q. And in the section marked -- on the middle of the  
7 right-hand side it says "Section 52050.18.2, Clothed Body  
8 Searches." Does that describe the Department's procedures,  
9 roughly, regarding the purpose of clothed body searches?

10 A. (Witness examines document.) Yes.

11 Q. What does it generally say about how clothed body  
12 searches -- what their purpose is or how they're to be  
13 conducted?

14 A. That they will be done in a random fashion, not more  
15 than -- no more frequent than is necessary to control  
16 contraband and items of, you know, concern to the institution.

17 Q. And then does this kind of operations manual in  
18 combination with the Penal Code 832, does it build what you  
19 have to instruct your students on?

20 A. Yes, it -- basically it's an extraction from what we put  
21 in our training documents.

22 Q. And at the Academy, does your particular section review or  
23 publish curriculum on how to do searches of inmates?

24 A. Yes.

25 Q. And do you also teach other subjects besides searching?

1     **A.**    Yes.

2     **Q.**    What are some of those subjects?

3     **A.**    Report writing, application of restraint gear, arrest and  
4    control methods, baton use, weapons training, which is a large  
5    part of the Academy.

6     **Q.**    Are students at the Academy taught with classroom  
7    instruction?

8     **A.**    Classroom and then hands-on.

9     **Q.**    And, so, classroom --

10           **MR. CUNNINGHAM:** I'm sorry. I didn't hear the last  
11   part of the answer. Classroom?

12           **THE WITNESS:** Classroom and hands-on, meaning actual  
13   reality based.

14           **MR. CUNNINGHAM:** Hands-on. Thank you.

15   **BY MR. LEWIS:**

16   **Q.**    Are they issued publications during their classroom  
17   instruction?

18   **A.**    Yes. They're issued workbooks.

19   **Q.**    I'm now going to show you what's previously been marked as  
20   Defendants' Exhibit A1.

21           **MR. CUNNINGHAM:** Yes.

22   **BY MR. LEWIS:**

23   **Q.**    I ask you to take a look at that.

24   **A.**    (Witness examines document.)

25   **Q.**    Does that document look familiar to you?

1    **A.**    Yeah.  It's a workbook.

2    **Q.**    And is that -- what is that workbook?  What is it?

3    **A.**    It's a workbook that we give our trainees in this  
4    particular case that will cover body, cell, area, and grid  
5    search.

6    **Q.**    So that is a workbook that's given to students to help  
7    educate them regarding how to conduct body searches?

8    **A.**    Yes.

9    **Q.**    Is there a date on the front page of that document?

10   **A.**    Yes.  It's a CPOST approved December 10th, 2003.

11   **Q.**    So what does the "CPOST approved" and that date mean?

12   **A.**    "CPOST" stands for Correctional Peace Officer Standards  
13   and Training, and the date is when that body approved it,  
14   section body approved it.

15   **Q.**    And do you recognize that as a training manual that your  
16   office uses?

17   **A.**    Yes.

18   **Q.**    Is that what is trained to cadets in the Academy?

19   **A.**    Yes.

20   **Q.**    All right.  Now I'd like you to look at page 16 of that  
21   document.

22   **A.**    (Witness examines document.)

23   **Q.**    And can you generally describe what page 16 discusses?

24   **A.**    (Witness examines document.)  It's -- it's the middle  
25   portion of a clothed body search.

1 Q. Does that thing -- does that document say anything about  
2 how to search an inmate's hip, buttock, or groin area?

3 A. Yes, it does.

4 Q. What does it say about how to search an inmate's groin  
5 area?

6 A. (Witness examines document.) Do you want me to read --

7 Q. Please read, yes.

8 A. Where it says "Male Inmates" or "Female Inmates"?

9 Q. "Male Inmates."

10 A. It says: (reading)

11 "Cup the groin to check for contraband. Do not  
12 squeeze the inmate's scrotum."

13 Q. Is this how correctional officers are trained to search  
14 inmate groin area?

15 A. Yes.

16 Q. So in your own words, how are they taught to -- how does  
17 the staff that works for you teach new correctional officers  
18 how to search inmates in their groin area?

19 A. Well, basically we tell them that that is one of the  
20 better hiding places for them to transport contraband,  
21 whatever; but, you know, it's a sensitive area, and you have to  
22 be careful about it. And it has to be searched, so whether we  
23 sweep with the front of the hand and we touch their whole body  
24 basically.

25 Q. And what kind of things are officers looking for when

1 they're searching a groin area or a body?

2 **A.** Contraband, such as, you know, what we call kites, which  
3 are notes transported between inmate-inmate or whatever; drugs;  
4 tattoo paraphernalia; tobacco; food; weapons.

5 **Q.** And are these items a threat to prison operations?

6 **A.** Yes.

7 **Q.** Why?

8 **A.** Well, it can put -- you know, our job is to protect the  
9 public, first of all, and that means keeping these inmates in  
10 custody; but it can present problems for staff, for inmates,  
11 and the institution as a whole.

12 When you introduce contraband, basically everything that I  
13 mentioned can be bartered or traded. It's like money.

14 **Q.** So then the Department has an interest in finding this  
15 stuff?

16 **A.** Correct.

17 **Q.** And you said that officers are instructed to cup the groin  
18 area. How is that cupping done? Can you show with your hand  
19 how that cupping is done, how officers instruct or how your  
20 training officers instruct other officers?

21 **A.** Well, so if I'm behind the inmate and you reach and your  
22 hand is cupped, and then you sweep and then you come back  
23 through.

24 **Q.** And what's that sweeping motion? How does --

25 **A.** Basically from pocket to pocket. So from your belt all

1 the way down to --

2 **THE COURT:** Why don't you -- if you're going to  
3 demonstrate, why don't you stand up so the jury can see what  
4 you're doing.

5 **THE WITNESS:** Well, I can't really do it on myself.

6 **THE COURT:** No, but, I know, but you were making --

7 **THE WITNESS:** So when you reach underneath, you go up  
8 above the belt area and sweep, and then come back through.

9 **BY MR. LEWIS:**

10 **Q.** And is a sweep from a hip to hip?

11 **A.** From what we call pocket to pocket.

12 **MR. LEWIS:** All right. And, so, for the record the  
13 witness has stood up and was making a sweeping motion with his  
14 hand across his body in the groin region.

15 **Q.** Would that be correct to say?

16 **A.** Right. From your waistline to....

17 **Q.** And then afterwards are they taught to pull their hand out  
18 through the groin area?

19 **A.** Yes.

20 **Q.** And are they taught to do -- why are they taught to do  
21 that?

22 **A.** In case there's anything hidden there, they can feel it,  
23 and that's why I think it specifically says in there to do not  
24 squeeze the scrotum.

25 **Q.** But it does say to cup the groin?

1     **A.**    Yes.

2     **Q.**    And why is it important -- is there a danger if officers  
3     don't sweep or search the groin area?

4     **A.**    Yes, for what I mentioned earlier as far as, you know,  
5     transporting contraband. I mean, that's dangerous for  
6     everybody that works in there.

7     **Q.**    And before you were a lieutenant --

8     **A.**    Or lives there.

9     **Q.**    I'm sorry.

10           Before you were a lieutenant at the training Academy, what  
11     other positions have you held at CDCR?

12     **A.**    I was an officer at San Quentin for 12 and a half years or  
13     I was assigned as an officer, as a sergeant and a lieutenant at  
14     San Quentin for 12 and a half years.

15     **Q.**    And during that time at San Quentin for 12 years, what  
16     kinds of positions did you hold?

17     **A.**    As an officer, I pretty much worked everywhere. In the  
18     housing unit, on the yard. As a sergeant, I did a lot of work  
19     in control in the housing units and in the watch office; R & R,  
20     receiving and release. As a lieutenant, the housing unit and  
21     watch commander.

22     **Q.**    During that time, did you have contact with inmates such  
23     that you would conduct clothed body searches on inmates at  
24     San Quentin?

25     **A.**    Yes.



1 Q. And during your time as an officer at San Quentin  
2 conducting clothed body searches, did you ever find contraband  
3 on inmates in their groin area?

4 A. Yeah, quite frequently.

5 Q. What kinds of items did you find?

6 A. Tattoo paraphernalia, drugs, tobacco, and a lot of food  
7 items.

8 Q. Food items?

9 A. Food.

10 Q. So you found food items in their groin?

11 A. Yeah.

12 Q. Once out of the Academy, do officers receive further  
13 training on their duties once they're in the individual  
14 institutions?

15 A. Yes. That's the other part of the job that I was -- that  
16 I'm responsible for, is the Field Training and Compliance Unit.  
17 We put out training material and curriculum to the IST offices  
18 to make sure that in their off-POST training they receive this  
19 updated annual training.

20 Q. And what subjects are instructed?

21 A. Again, range, baton, chemical agents, alarm response,  
22 emergency operations, searching, in some cases report writing.

23 Q. And as part of that searching curriculum, are officers  
24 retrained regarding how to conduct clothed body searches?

25 A. Yes. It's more of a refresher, yes.

1 Q. And is this refresher training uniform across all CDCR  
2 institutions?

3 A. Yes.

4 Q. And is your office -- I guess, is your office responsible  
5 for ensuring that it's uniform?

6 A. Yes.

7 Q. And are officers still instructed to cup the groin?

8 A. Yes.

9 Q. So today officers in CDCR are still instructed to cup the  
10 groin during a clothed body search?

11 A. Yeah. This is the same one that's used only. It's been  
12 updated, different date.

13 MR. LEWIS: All right. Thank you. No further  
14 questions.

15 THE COURT: Cross-examination?

16 MR. CUNNINGHAM: Yes, Your Honor. Thank you.

17 CROSS-EXAMINATION

18 BY MR. CUNNINGHAM:

19 Q. Good morning, Lieutenant.

20 A. Good morning. How are you?

21 Q. I'm good. How about yourself?

22 A. Good.

23 Q. All right. Have you been briefed about the specifics of  
24 this case?

25 A. Not necessarily, no.

1 Q. What the accusation is or anything like that? You don't  
2 know that?

3 A. All's I know is I was contacted by Mr. Lewis saying that  
4 he was discussing with me how inmates were searched, and that  
5 it was a federal case; and he told me exactly -- he just said  
6 that -- I think he said sexual harassment.

7 Q. All right. So you did know that and you do know that this  
8 is about a claim or claims that during clothed body searches  
9 there was a squeezing of the genitals and of the penis and  
10 gestures like that; is that right?

11 MR. LEWIS: Objection. Misstates the testimony,  
12 Your Honor.

13 THE COURT: Overruled. I'll allow him to answer the  
14 question.

15 THE WITNESS: No, that wasn't disclosed to me.

16 BY MR. CUNNINGHAM:

17 Q. All right. Well, I'm disclosing it now, all right,  
18 that --

19 A. Okay.

20 Q. -- that this is --

21 THE COURT: Proceed by questions and answers.

22 MR. CUNNINGHAM: Yes, sir.

23 Q. Do you have any problem discussing that aspect of the  
24 issue of clothed body searches and cupping the groin,  
25 et cetera?

1     **A.**    No.

2     **Q.**    In the training that is given and with the use of the  
3     manual, the manual is quite detailed in terms of how the search  
4     should proceed from step to step to step; right?

5     **A.**    Yes.

6     **Q.**    That almost every part of the body is covered by a  
7     separate question or instruction the way it's written out;  
8     fair?

9     **A.**    Yes.

10    **Q.**    And they're tested on that, as they go through, have they  
11    absorbed the knowledge of what the trainers expect them to  
12    understand about how to do these searches; fair?

13    **A.**    Yes.

14    **Q.**    Uh-huh.  And these are -- as counsel pointed out, this  
15    stuff is codified in Penal Code 832, and in Title 15, and in  
16    your operations manual, and in the training manual; correct?

17    **A.**    Correct.

18    **Q.**    Uh-huh.  And, obviously, the purpose of it is, as you  
19    testified, as part of the overall effort to control or at least  
20    retard any contraband traffic in and out of the institution;  
21    right?  In the institution.

22    **A.**    Or coming into it, yeah.

23    **Q.**    Yeah.  And coming into it is also an issue; right?  The  
24    same kind of searches are done on family members who come to  
25    visit on occasion; correct?

1   **A.**   Not necessarily, but they're put through a different type  
2   of screening, yeah.

3   **Q.**   But they're -- in other words, there are methods applied  
4   to screen for contraband coming in?

5   **A.**   Correct.

6   **Q.**   And how about staff, does the staff go through these  
7   clothed body searches?

8   **A.**   No.

9   **Q.**   Do they go through -- what kind -- do they go through any  
10   search when they come into the institution, come to work?

11   **A.**   No. They basically know what they're allowed to bring in  
12   and what they're not allowed to bring in.

13   **Q.**   Uh-huh. But -- well, is it fair -- is it fair to say the  
14   flow of contraband pretty much never stops in these  
15   institutions; isn't that right?

16           **MR. LEWIS:** Objection. Calls for speculation.

17           **THE COURT:** Given what he's testified to already, I'll  
18   direct --

19           **MR. LEWIS:** Withdrawn, Your Honor.

20           **THE COURT:** I think he has knowledge of that.  
21   Overruled.

22                           (Pause in proceedings.)

23   **BY MR. CUNNINGHAM:**

24   **Q.**   So the question is: It's fair to say the flow of  
25   contraband never stops, it's always a continuing problem in the

1 institution and in and out of the institution; fair?

2 **A.** Yes, but that doesn't mean that we shouldn't try to deter  
3 it and prevent it as much as we possibly can.

4 **Q.** Oh, of course, not. And that's the reason that they have  
5 the provision for not just random clothed body searches but  
6 further searches, strip-searches, whatever, when there is a  
7 reasonable suspicion established in a clothed body search;  
8 correct?

9 **A.** Yes.

10 **Q.** And is it not also the case that when a -- when an officer  
11 does a clothed body search and believes that he or she has  
12 detected some foreign object under the clothing, then the  
13 prisoner is taken to some special place and strip-searched  
14 normally; right?

15 **A.** Yes, that is normal procedure, but there is some  
16 discretion there.

17 **Q.** Discretion for who?

18 **A.** Depending on what they find.

19 **Q.** Uh-huh. But I'm saying if they feel -- if they feel that  
20 there is something there, then are they authorized to go inside  
21 the clothing and get it or do you have to go to the  
22 strip-search then?

23 **A.** Well, I can't speak to every single case; but, like I  
24 said, if you're doing the clothed body search the correct way,  
25 you'd ask the inmate if they have anything on them. And a lot

1 of times we ask them to turn their pockets inside out; and if  
2 we have an another cover officer, those items that they take  
3 out of their -- off their person are given to that cover  
4 officer. So after that, if they still have items on them,  
5 yeah, it's going to probably be a little more of an intense  
6 search.

7 **Q.** Okay. When you say "the cover officer," this is a second  
8 officer that's normally present when a clothed body search is  
9 performed?

10 **A.** Well, not all the time but there should be somebody there.  
11 It's a good idea to always have somebody there.

12 **Q.** Uh-huh. And when it's -- when the searches are being done  
13 at random in corridor traffic where there are a lot of inmates  
14 passing back and forth, they normally have a cover officer who  
15 watches the traffic while the other officer does the search on  
16 the wall; is that right?

17 **A.** I would hope so. I can't speak for every institution,  
18 sir.

19 **Q.** I understand. But that would be what you would teach and  
20 what you would hope would happen, what you would expect to be  
21 the practice?

22 **A.** What we teach, yes.

23 **Q.** And they do -- they are taught, as well as in connection  
24 with the clothed body search, to get the inmate against the  
25 wall; correct?

1     **A.**    Yes, that's a method.

2     **Q.**    Put his hands up on the wall and lean, pull the feet back  
3     and legs apart and lean so that the weight is against the wall  
4     on the hands?

5     **A.**    Yes.    So we have a position of advantage, yes.

6     **Q.**    Yes.    And do you teach, then, that the search should be  
7     done with both hands up and down the leg or in the body, or is  
8     it done only with one hand?

9     **A.**    We teach with you put one hand on the collar normally and  
10    the other hand is the one that's doing the searching.

11    **Q.**    Okay.   And when you say "on the collar," you grab ahold of  
12    the collar of the clothing?

13    **A.**    Yes.

14    **Q.**    Okay.

15    **A.**    On occasion.

16    **Q.**    But you don't -- you put it up there in the back of the  
17    neck --

18    **A.**    Right.

19    **Q.**    -- area?

20    **A.**    Correct.

21    **Q.**    Okay.   How about in the middle of the back?

22    **A.**    Do we put our hand in the middle?

23    **Q.**    Yeah.   Is that acceptable?   As opposed to up at the top,  
24    is the middle of the back a reasonable way to do it?

25    **A.**    I guess you could do it that way.   That's not the way we



1 teach it but, okay.

2 Q. You teach it up at the neck?

3 A. Right.

4 Q. And do you teach them that it's okay to put the elbow in  
5 the back, in the small of the back, and lean on the prisoner's  
6 body that way while they're searching with the other hand?

7 A. Sir, the way I teach it is if I grab your collar, my whole  
8 arm is against your back.

9 Q. Okay.

10 A. So if that's what -- if you're describing jabbing them,  
11 no; but placing your forearm against them, yes.

12 Q. The forearm would be flat against the back?

13 A. Correct.

14 Q. The elbow wouldn't be jabbing into the back; correct?

15 A. Correct. We don't teach that.

16 Q. That wouldn't be right; would it?

17 A. No. The way you're describing it, no.

18 Q. Okay. And I know you said you know that the training is  
19 from the book, but it's also reality based; right?

20 A. Correct.

21 Q. Hands-on, you try to recreate the real-world situation  
22 that these people coming through the Academy are going to meet  
23 when they are working in institutions?

24 A. That's correct.

25 Q. Okay. And, so, what -- and, of course, we understand that

1 searching the groin area, searching near -- at and near where  
2 the genitals are, that's a really sensitive thing; right?

3 A. Yes.

4 Q. And I know that --

5 A. Any searches, I think, are sensitive.

6 Q. Yes. But isn't there a heightened phase of the search  
7 when it gets to the crotch?

8 A. I don't know. When you do -- when the inmates are  
9 strip-searched, I think that that is more of a loss of dignity  
10 than what you're talking about, but that's just my personal  
11 opinion.

12 Q. Yes. But -- and I'm not saying that -- well, strike it.

13 I mean, prisoners have to go through thousands of searches  
14 in the course of years in prison; right?

15 A. Not only of their person, but of their belongings and  
16 everything else. So I don't really see that one is more  
17 important than the other. It's just what we have to do.

18 Q. And from the standpoint of the training, I understand  
19 that. What about in the reality-based aspect of it, though?  
20 Isn't it true that there is a special sensitivity around the  
21 genitals, and that special care is needed in doing that part of  
22 a clothed body search not to get the person mad at you for the  
23 way you do it; right?

24 A. Well, I don't know because I don't know what's in their  
25 head; but I would say that probably, yeah, if it was me, I'd

1 probably, you know, be a little more sensitive.

2 But what I'm trying to say is, nobody likes to be  
3 searched, nobody likes to be strip-searched, nobody likes to  
4 have their property gone through. It's just one of those  
5 things.

6 Q. Uh-huh.

7 A. It's unfortunate for them, but that's what we're mandated  
8 to do.

9 Q. Uh-huh. But, again, I don't want to belabor it, but the  
10 possibility of a sudden outburst of anger or resentment is much  
11 heightened at the point -- I mean, it might be heightened if  
12 the person is searching the cell and he takes a photograph off  
13 the wall and tears it in half. That would be something that  
14 would -- you could --

15 A. I think that would be equally as important.

16 Q. Yes. But there would be a principle in any case, don't  
17 provoke the prisoner; right? Don't do anything gratuitous to  
18 start trouble?

19 A. That's a fair statement, sure.

20 Q. Don't take it on yourself to make sure he hates being in  
21 prison?

22 THE COURT: Mr. Cunningham, please make sure that you  
23 allow the witness --

24 MR. CUNNINGHAM: I'm sorry. Of course, Judge.

25 THE COURT: -- to answer your question.

1           **THE WITNESS:** That's a fair statement.

2           **BY MR. CUNNINGHAM:**

3           **Q.** It kind of goes without saying, I understand that, but  
4 that has turned to be what our case is about. So that's why  
5 I'm pressing the subject.

6           **THE COURT:** Don't editorialize, please. Just ask  
7 questions.

8           **MR. CUNNINGHAM:** All right.

9           **Q.** And at least in the manual you have that line about "DO  
10 NOT SQUEEZE THE SCROTUM" written in capital letters; right?

11          **A.** Correct.

12                               (Pause in proceedings.)

13          **BY MR. CUNNINGHAM:**

14          **Q.** And, as a matter of fact, if you look at that section of  
15 the workbook, and I'm sure you're familiar with it, that's the  
16 only statement that's in capital letters in several pages of a  
17 description that -- except for the statement on page -- well,  
18 it's 36 of this document, "SWITCH FEET IN YOUR STANCE WHEN  
19 YOU'RE GOING FROM ONE SIDE OF THE BODY TO THE OTHER"?

20          **A.** You're talking about page 16?

21          **Q.** Page 16 is where the line about the "DO NOT SQUEEZE THE  
22 SCROTUM" is; right?

23          **A.** Okay. Yeah, it's in all caps.

24          **Q.** I mean, I -- I don't know if I have a different document  
25 than you do. Mine is on page 37 or is marked page 37, AG0595.

1           **THE COURT:** Are we referring to -- what are we  
2 referring to?

3           **MR. CUNNINGHAM:** Exhibit 1 -- Exhibit A I think it is.  
4 And I can't exactly account for the difference in pagination.  
5 It's the one we were given.

6           **THE COURT:** Let's make sure we're all on the same  
7 line.

8           **MR. CUNNINGHAM:** Oh, I'm sorry. He's referring to the  
9 AGO pages and I was referring to the documents.

10          **MR. LEWIS:** Same page, 16 and 16.

11          **MR. CUNNINGHAM:** Well, this is what I've got.

12                           (Pause in proceedings.)

13          **MR. CUNNINGHAM:** All right. Let me look at that.  
14 Judge, I was provided with a different version of the  
15 manual apparently. It has different pagination. I just want  
16 to check the exhibit. Thank you.

17                           (Pause in proceedings.)

18   **BY MR. CUNNINGHAM:**

19   **Q.** You said the manual is updated periodically; right?

20   **A.** Correct.

21   **Q.** And can you recall that at some point the whole typeface  
22 and the layout and everything was changed?

23   **A.** Yes, it is.

24   **Q.** So that I -- strike it.

25          **MR. CUNNINGHAM:** Let me -- I'll show him this other

1 version, Judge, just without bothering to mark it.

2 **Q.** Is this a familiar format to you as well (indicating)?

3 **A.** Yes. What --

4 **THE COURT:** Let's all -- I'm sorry. Let's all be on  
5 the same page here --

6 **MR. LEWIS:** So, Your Honor --

7 **THE COURT:** -- with the document. I mean, I'm not  
8 interested in the questions that are asked. I would like the  
9 document to be used to be the same that you use and counsel  
10 uses so there isn't confusion for the jury.

11 **MR. LEWIS:** Your Honor, we've used Exhibit A1. It  
12 appears that Mr. Cunningham has a different document that's not  
13 Exhibit A1.

14 **THE COURT:** Is it just a question of pagination?

15 **MR. LEWIS:** It's a completely different document.

16 **THE COURT:** All right. Well, then, if that's a  
17 completely different document, then do you want to mark that as  
18 Plaintiffs' next in order and then show the witness Plaintiffs'  
19 next in order?

20 **MR. CUNNINGHAM:** I do do want. I just want to make  
21 sure it's the same text, Judge, and I think he can probably  
22 satisfy us of that. I can do that and mark the other one, the  
23 one that was turned over to us.

24 **THE COURT:** Is there some reason you couldn't use  
25 Defendants' A rather than the one that you have?

1           **MR. CUNNINGHAM:** Well, except by the fact that it's a  
2 different format, I'm not familiar with it. I'm not going to  
3 go into it a great deal, but let me just look at it briefly, if  
4 that's all right, and make sure that I can deal with.

5                               (Pause in proceedings.)

6           **BY MR. CUNNINGHAM:**

7           **Q.** I'm sorry for the confusion. You could recognize the  
8 earlier version -- strike it.

9           Was that earlier or later? Do you know?

10          **A.** The one you had?

11          **Q.** The one I showed you.

12          **A.** I'd have to look at it.

13          **Q.** Uh-huh. But it's a different version of the same text  
14 basically, as far as you know; is that correct?

15          **A.** I don't know what the date is on that.

16          **Q.** This one is marked "CPOST Approved December 10th, 2003."

17          **A.** Okay. Do you want me to look at the document so I can  
18 make a better decision?

19               **THE COURT:** If it's a different document, mark it.

20           **MR. CUNNINGHAM:** We better mark it. But I want to get  
21 the whole document, Judge, so I have to take a minute and look  
22 for it.

23                               (Pause in proceedings.)

24           **MR. CUNNINGHAM:** Okay. I'm going to use the excerpt,  
25 Judge. Will you mark this as Plaintiffs' next in order for me.

(Plaintiffs' Exhibit 14 marked for identification) (14)

**BY MR. CUNNINGHAM:**

**Q.** I'm sorry this is complicated like this, but I had a note.

So that's a selection of pages from the entire document that we were provided with, the pages referring to the clothed body search.

**A.** Well, just from the few things that I've just scanned, what you have here is a combination of a student workbook and an instructor's guide, so I don't know where you got this from. It's not a complete document, though.

**Q.** No, I understand it's not complete. Some pages were taken out of it, but we were provided with what I believe was an entire document. If --

**A.** No, because --

**THE COURT:** Could we have a sidebar?

**MR. CUNNINGHAM:** Sure.

(Sidebar conference heard but not reported.)

**THE COURT:** Ladies and gentlemen of the jury, I apologize, but in order to avoid confusion, I'm going to ask you to take a brief 15-minute recess so that the parties can settle which documents they're showing to whom, and that way we don't have an issue.

Thank you. And I'll ask you to be back in your seats let's say five after 10:00.

Thank you so much.



## PROCEEDINGS

1 (Proceedings were heard out of the presence of the jury:)

2 **THE COURT:** All right. Why don't you guys --

3 **MR. CUNNINGHAM:** Yes, sir.

4 **THE COURT:** -- settle on one document that reflects  
5 what the lieutenant -- Lieutenant, you can step down -- the  
6 lieutenant is talking about so that we have a document.

7 **MR. LEWIS:** Yes, Your Honor.

8 **THE COURT:** I mean, unless, Counsel, unless there's an  
9 issue that you're going to impeach him with something  
10 different. I mean, I understand that. But if we're talking  
11 about the same document and all there is is the pages are  
12 different, then let's get this settled and use one document.

13 **MR. CUNNINGHAM:** We can do it, Judge, and we'll just  
14 consult with the witness.

15 (Recess taken at 9:54 a.m.)

16 (Proceedings were heard out of presence of the jury:)

17 **THE COURT:** All right. We're all on the same page  
18 now.

19 **MR. CUNNINGHAM:** Well, Judge, can I explain the  
20 situation?

21 **THE COURT:** I'm not interested in explaining the  
22 situation. I want to know if you now all have the same  
23 document you can use to question the Lieutenant.

24 **MR. CUNNINGHAM:** I think we have two different  
25 documents, Judge, and they were two different documents. One

## PROCEEDINGS

1 was for the students and the other was for the instructors.

2 And so then the text is entire -- is different. And the  
3 answers to a lot of questions that are in the student's book  
4 are in the instructor's book. And there's a whole -- It's --  
5 On one side of the page, it's written under a heading  
6 "Instructor's Dialogue."

7 Now, that's the version -- The instructor's version is the  
8 version that was turned over to me in 2009 in the entirety of  
9 the AGO pages.

10 There's another version, the student's version, which  
11 counsel had come into possession of, that I never saw, but that  
12 he had used in the sealed exhibit in the motions in the last  
13 year or so.

14 And it wasn't -- He wasn't aware of the difference and I  
15 certainly wasn't because I never saw the sealed exhibit. I  
16 never asked for it because I knew I had it, or I thought I knew  
17 I had it.

18 **THE COURT:** Lieutenant, are there two different  
19 versions? I mean, so one that the teachers get --

20 **THE WITNESS:** The instructor version, Judge, is  
21 just -- It -- It accentuates more than what the instructor has  
22 to get across.

23 So there's training notes in there. There's visual aids  
24 that --

25 **THE COURT:** I used to teach P.O.S.T. so it's the

## PROCEEDINGS

1 P.O.S.T. teacher's version vs. the P.O.S.T. student version.

2 **THE WITNESS:** Correct.

3 **THE COURT:** But it does contain different things in  
4 the teacher's version.

5 **THE WITNESS:** It just elaborates more.

6 **THE COURT:** Yeah, right. So . . . which one do you  
7 want to cross-examine with?

8 **MR. CUNNINGHAM:** Judge, at this point, I haven't seen  
9 a -- a problem with the -- using either one --

10 **THE COURT:** Well, but --

11 **MR. CUNNINGHAM:** -- but I would rather --

12 **THE COURT:** But the witness doesn't know what you're  
13 talking about.

14 **MR. CUNNINGHAM:** I'm sure. I'd rather use the one I'm  
15 familiar with and that I've poured over.

16 **THE COURT:** Do we have a second copy for him to look  
17 at while you're looking at it?

18 **MR. CUNNINGHAM:** Yes. Yes.

19 **THE COURT:** All right. Why did that --

20 **MR. CUNNINGHAM:** They kindly made us a copy.

21 **THE COURT:** Shall we go ahead and do that?

22 **MR. LEWIS:** Your Honor, that's fine. If the witness  
23 is comfortable with it.

24 **THE COURT:** All right. Let's take whatever you have  
25 now off the bench, yours.

## PROCEEDINGS

1           **MR. LEWIS:** We'll take Exhibit A1 off.

2           **THE COURT:** Off.

3           Now, this is the one that we've been talking about that  
4 they have.

5           **MR. LEWIS:** No. This is actually a different document  
6 altogether.

7           **THE COURT:** Then take that off so . . .

8           **MR. QUINN:** We need to have this marked.

9           **THE CLERK:** That's 14. Isn't that the one you just  
10 marked as 14?

11           **MR. CUNNINGHAM:** No. This is an excerpt.

12           **THE CLERK:** Right there. See on the front?

13           **MR. CUNNINGHAM:** Yes.

14           **THE CLERK:** On the front there, it says 14. Doesn't  
15 it say 14 at the bottom?

16           **MR. CUNNINGHAM:** Yes.

17           **THE CLERK:** Okay. That's the one I just did.

18           **THE COURT:** You have two copies of that?

19           **MR. CUNNINGHAM:** I want to point out that this is an  
20 excerpt I had which is just the portion on the clothed-body.

21           **THE COURT:** And that's the one you want.

22           **MR. CUNNINGHAM:** That's the one.

23           **THE COURT:** You make a copy of that, put on it on the  
24 stand.

25           **MR. CUNNINGHAM:** Yes.

## PROCEEDINGS

1           **THE COURT:** Then you can ask him if he's familiar with  
2 it.

3           Why don't you take the stand again.

4           Okay. So now everybody has a copy of the document we've  
5 been talking about.

6           **MR. CUNNINGHAM:** Yes, sir.

7           **THE COURT:** Mr. Lewis?

8           **MR. LEWIS:** No, Your Honor, but we don't have an  
9 objection.

10          **THE COURT:** All right. Could you -- Lisa, could you  
11 bring the jury in? Thank you.

12          **THE CLERK:** Okay.

13          (Proceedings were heard in the presence of the jury:)

14          **THE CLERK:** Please be seated.

15          **THE COURT:** All right. Ladies and gentlemen of the  
16 jury, I believe we've resolved the issue with the documents and  
17 I believe now both the witness and defense counsel and also --  
18 excuse me -- plaintiff's counsel and defense counsel are all on  
19 the same page, so to speak.

20          **MR. CUNNINGHAM:** We hope. We're going to try to be.

21 **BY MR. CUNNINGHAM:**

22 **Q.** Lieutenant, just so I can clear this up a little bit for  
23 the jury:

24          We have two versions of this training document; correct?  
25 And we've recognized that now in the break?

## PROCEEDINGS

1     **A.**    Yes.

2     **Q.**    And one is for instructors and one is for students; fair?

3     **A.**    Yes.

4     **Q.**    Okay.  And the one that now is in front of you is an  
5    excerpt from the Instructor's Manual; correct?

6     **A.**    Except for the first two pages, yes.

7     **Q.**    Okay.  And -- And in those pages, on the -- where -- where  
8    it's marked at the bottom AGO595, and it also says from the  
9    document itself Page 37.

10           Do you see that?

11    **A.**    (Examining document.)

12           Page 37 and 595?  Yes.

13    **Q.**    Yeah, okay.  And on that page there, that's where it's  
14    written in capital letters:  "

15                   "DO NOT SQUEEZE THE INMATE'S SCROTUM."

16           Right?

17    **A.**    Correct.

18    **Q.**    And that's in capital letters for a reason; right?

19    **A.**    Yes.

20    **Q.**    And the reason is?

21    **A.**    It emphasizes do not do that.

22    **Q.**    Okay.  And I think on the preceding page, you can look and  
23    see at the very bottom there's another statement in the -- in  
24    capital letters; right?

25    **A.**    (Examining document.)

## PROCEEDINGS

1 On Page 36? Yes.

2 Q. And that is --

3 A. "SWITCH FEET IN YOUR STANCE."

4 Q. What does that mean exactly?

5 A. That means so you don't lose the position of advantage.  
6 So when you go from one side of the body to the other, they  
7 want you to switch.

8 Q. Okay.

9 A. It should also be emphasized.

10 Q. You -- You mean --

11 THE COURT: When you -- I'm sorry.

12 When you say "switch feet," just so that I'm clear, you  
13 mean for the correctional officer --

14 THE WITNESS: The officer --

15 THE COURT: -- to switch.

16 THE WITNESS: Yes. You're standing with your posture  
17 like this (indicating) searching this side (indicating). When  
18 you go to the other side, it wants you to switch feet  
19 (indicating).

20 THE COURT: So you change the balance. You change  
21 where the --

22 THE WITNESS: Correct.

23 THE COURT: -- where the weight is on your feet.

24 THE WITNESS: Correct.

25 THE COURT: Okay. Thanks.

## PROCEEDINGS

1 BY MR. CUNNINGHAM:

2 Q. Do you switch it over -- move over to that side a little  
3 bit so that you -- There's a little arc to the two positions,  
4 from one side to the other?

5 A. Well, you -- As an officer, you don't want to lose the  
6 position of advantage.

7 Q. That's the point.

8 A. That's correct.

9 Q. And that's why that one's capitalized; right?

10 A. Correct.

11 Q. And there's nothing else that's capitalized in the whole  
12 thing that I could find. I don't know if you --

13 A. Without reading through the whole document, I don't know  
14 that there is.

15 Q. I don't think there is. Well, it'll be in evidence and we  
16 won't have to worry about it.

17 But . . . I guess my question, then, is now that that's  
18 hopefully clear . . .

19 In the -- In the instruction and keeping with the  
20 capitalizing the -- the -- the . . . admonishment not to  
21 squeeze the scrotum, that's because of the sensitivity of that  
22 part of the search, isn't it, where the genitals are and the  
23 possibility that if it was done wrong, it could start trouble.

24 Is that fair to say?

25 A. Um . . . Yeah, but I also would think that if something



## PROCEEDINGS

1 like that would happen, that the staff member that accidentally  
2 did that would learn from it and -- just like anything else.

3 Q. Wouldn't do it again.

4 A. Well, would definitely -- We're required to search that  
5 area.

6 Q. Yes.

7 A. But to say that I would be scared not to go back to that  
8 area because I didn't want to upset somebody, sir, working in  
9 the prison, I have inmates upset at me every day.

10 Q. I'm sure that's true, but I'm not talking about going back  
11 to the area so much as -- as a grabbing, an illicit grabbing,  
12 squeezing, that goes beyond the proper searching technique, the  
13 need to --

14 A. If -- If a staff member does that, they're doing it  
15 incorrectly.

16 Q. And it's -- it's wrong; right? It's trouble; isn't it?

17 A. Well, yeah.

18 Q. And if a -- If he does something like squeeze the scrotum  
19 or squeeze the penis to the point that the prisoner comes off  
20 the wall in anger, then it's real trouble; isn't it?

21 A. If you're asking me about a hypothetical situation, yeah.

22 Q. Yeah. And -- And so wouldn't you expect, if it happened  
23 one time, then the -- the staff member would understand he'd  
24 better be careful not to do that again?

25 A. I -- I guess I'm -- I'm really going to be kind of

## PROCEEDINGS

1 critical on how I take that question, because I think you need  
2 to be a little more specific on what you mean, "do that again."

3 We're going to Search that area, sir.

4 Q. I understand. And you're going to search it, as you  
5 described, with the hand through the legs all the way up across  
6 the belt line from pocket to pocket so that if there's anything  
7 in this area (indicating) --

8 A. Right.

9 Q. -- that's foreign --

10 A. Or underneath.

11 Q. -- it's detected.

12 A. Right.

13 Q. And you come through the back.

14 A. Correct.

15 Q. You come all the way through --

16 A. Right.

17 Q. -- to sweep the front, and then you come under --

18 A. Right.

19 Q. -- and you go across the groin; right?

20 A. Right.

21 Q. The groin being the area at the top where the two thighs  
22 come together.

23 A. Correct.

24 Q. And in the course of doing that, you sweep across the  
25 scrotum as well; right? The penis and the scrotum.

## PROCEEDINGS

1     **A.**     Correct.

2     **Q.**     But if you were to stop and grab the penis and squeeze it,  
3     till it hurt a person and made them him away, or the scrotum,  
4     that would be absolutely wrong; wouldn't it?

5             **MR. LEWIS:**   Objection, Your Honor:   Argumentative.

6             **MR. CUNNINGHAM:**   I'll -- I'll withdraw --

7             **THE COURT:**   No, it's -- it's --

8             **MR. CUNNINGHAM:**   -- the question.

9             **THE COURT:**   It's been asked and answered.

10            **MR. CUNNINGHAM:**   Okay.

11     **BY MR. CUNNINGHAM:**

12     **Q.**     Don't you teach them to be careful not to do that?   You'd  
13     better not do that?

14     **A.**     Yeah.   It's in the Instruction Manual.

15     **Q.**     All right.

16                                 (Pause in proceedings.)

17     **BY MR. CUNNINGHAM:**

18     **Q.**     And you're not called upon to judge somebody -- a  
19     complaint that somebody makes that "He squeezed my penis" or  
20     "He squeezed my scrotum"; right?

21     **A.**     Well, if it's brought to my attention, yeah, I would deal  
22     with it.

23     **Q.**     You would deal with it.   Would -- Well, strike it.

24             It wouldn't happen in the academy; right?   You don't have  
25     prisoners to practice on in the academy; do you?

## PROCEEDINGS

1     **A.**    No.    But  --

2     **Q.**    Okay.

3     **A.**    -- I've also worked in the prisons so  --

4     **Q.**    Yes, I understand that.  That's my next question.

5            Did anything like that ever happen to you or come to your  
6   attention in the  -- working in the prison?

7     **A.**    Having an officer grab an inmate's penis?  No.

8     **Q.**    Yes.

9     **A.**    (Shaking head.)

10    **Q.**    And if you were a Supervisor and somebody came to you with  
11   a 602 and say, "He grabbed my penis and squeezed it," or "He  
12   grabbed my scrotum and squeezed it," you'd take action;  
13   wouldn't you?

14    **A.**    Yes.

15    **Q.**    You'd have the guy sit down and you'd find out what in the  
16   world was going on with him; right?

17    **A.**    Yeah.

18    **Q.**    And if he  -- If he had five 602s or 15 602s all saying the  
19   same thing  --

20            **MR. LEWIS:**  Objection  --

21    **BY MR. CUNNINGHAM:**

22    **Q.**    -- you'd  --

23            **MR. LEWIS:**  -- Your Honor  --

24    **BY MR. CUNNINGHAM:**

25    **Q.**    -- you'd  --

## PROCEEDINGS

1           **MR. LEWIS:** -- argumentative.

2           **THE COURT:** Overruled.

3           **BY MR. CUNNINGHAM:**

4           **Q.** As a Supervisor, now you've really got a problem; isn't  
5 that true?

6           **A.** I'd probably look at it a little bit different. I'd look  
7 at the staff that I have there, and maybe it could be a  
8 training issue. Maybe this guy is actually doing his job where  
9 maybe some of the other ones aren't.

10           And we also teach in the Academy that that's one way  
11 inmates can get rid of a staff member that's doing their job,  
12 is to complain.

13           **Q.** Uh-huh. And so would that be your reaction, if 15 inmates  
14 complained about --

15           **A.** No.

16           **Q.** -- a --

17           **A.** I said I -- that's something that I would look at.

18           **Q.** You'd have to take into account.

19           **A.** Correct.

20           **Q.** And you'd talk to the Supervisors, and you'd talk to other  
21 officers who've done searches with the guy --

22           **A.** Right.

23           **Q.** -- and like that; right?

24           You really have to make a thorough, detailed investigation  
25 in order to satisfy yourself that it was okay to leave an

## PROCEEDINGS

1 officer in the position where he's doing these searches on  
2 prisoners on a daily basis; isn't that true?

3 A. I would do an investigation and that would be my job, yes.

4 Q. And if it was -- If you were persuaded -- Strike it.

5 In the investigation, would you talk to inmates who were  
6 complaining in saying that he did this?

7 A. Yes, I would.

8 Q. Okay. And -- And would you expect --

9 A. That's required.

10 Q. Would -- Would you expect to talk to every inmate --  
11 inmate -- every prisoner -- I'm sorry -- who -- who made such a  
12 complaint in a 602?

13 A. If they had filed a 602.

14 Q. A 602 is -- Filing a 602 is a serious step; isn't it?

15 A. Yes.

16 Q. And when you accuse a staff member of outright wrongdoing,  
17 that's a real serious step, isn't it, for a prisoner to take?

18 A. In . . . That's actually a -- a different procedure,  
19 yes.

20 (Pause in proceedings.)

21 BY MR. CUNNINGHAM:

22 Q. Did it ever come to your attention that sometimes, when  
23 prisoners make 602s accusing serious -- accusing a staff of  
24 serious wrongdoing, that their . . . that other staff members  
25 put pressure on them to withdraw it, or threaten them with

## PROCEEDINGS

1 going to the hole if they don't withdraw it?

2 (Pause in proceedings.)

3 **THE WITNESS:** I -- I can't say that I've ever heard  
4 that, but what I -- I know for a fact is that inmates have made  
5 false accusations.

6 **BY MR. CUNNINGHAM:**

7 **Q.** Uh-huh.

8 **A.** Okay? And there is no . . . anymore type of . . . I  
9 think -- How can I say? -- ramifications for them filing a  
10 false accusation against a staff member.

11 **Q.** Right. In the Statement of Rights and Responsibilities;  
12 right? If you make a false charge, you can be prosecuted;  
13 right?

14 **A.** Well, there are no more -- more ramifications for  
15 inmates' complaint on staff if it's proven to be false.

16 **Q.** There are consequences.

17 (Pause in proceedings.)

18 **BY MR. CUNNINGHAM:**

19 **Q.** I mean, in something like that, the prisoner says, "Well,  
20 when he was doing the clothed-body search and he was searching  
21 my groin area, he grabbed my penis and squeezed it hard" or "he  
22 grabbed my scrotum and squeezed it hard."

23 (Pause in proceedings.)

24 **BY MR. CUNNINGHAM:**

25 **Q.** This is something that -- that . . .

## PROCEEDINGS

1 Well, strike it. I'm sorry. I've lost my train of  
2 thought there.

3 (Pause in proceedings.)

4 **BY MR. CUNNINGHAM:**

5 **Q.** Would -- Would -- Would -- In the -- In the instruction on  
6 this, do you or don't you -- do the teachers at the Academy or  
7 don't they -- give a special admonishment about that? About  
8 the searching the groin area because of sensitivity.

9 **A.** Yes, I -- I believe that I already answered that, and you  
10 asked me already. That's why it's --

11 **Q.** All right.

12 **A.** It's capitalized --

13 **Q.** As --

14 **A.** -- in caps.

15 **THE COURT:** Why don't we move on, counsel.

16 **MR. CUNNINGHAM:** I'm going to do that, Judge.

17 (Pause in proceedings.)

18 **BY MR. CUNNINGHAM:**

19 **Q.** You, in the -- in the role of field training and  
20 compliance, are you, and were you in 2006 and 2007, in touch  
21 with various institutions to make sure that they were . . . in  
22 compliance with the -- the training that's given to the  
23 officers and they weren't having particular problems with any  
24 part of the training?

25 **A.** We -- We contact in-service training officers quite



## PROCEEDINGS

1 frequently because we go out and audit. We provide the  
2 training materials.

3 Q. Um-hmm.

4 A. And when we go out and audit, we make sure that the  
5 training is offered, that it's attended, and it's documented.

6 Q. Okay. And -- And the on-the-job training, it has a  
7 specific component about clothed-body searches; right?

8 A. Sir, I'm mandated to put out a -- an outpost training  
9 schedule for every Correctional Officer in the State of  
10 California.

11 And that outpost training schedule consists of 40 hours of  
12 training, one week -- 40 hours of continuous training, so  
13 that's one week out of the calendar year. And they have to do  
14 12 hours of what they call on-the-job training, required  
15 on-the-job training.

16 And that's the schedule I put out.

17 What the institutions do, I will not know what they do  
18 until I go to that institution and audit.

19 But they know, according to the DOM, that they are  
20 supposed to provide every officer, custody staff member, up to  
21 the classification of a Lieutenant, at least 52 hours of  
22 training --

23 Q. Um-hmm.

24 THE COURT: I'm --

25 THE WITNESS: -- annually.

## PROCEEDINGS

1           **THE COURT:** I'm sorry.

2           I'm a little confused, Lieutenant.

3           So each calendar year, a Correctional Officer has to have  
4 how many hours of -- of OTJ -- you know, on-the-job training?

5           **THE WITNESS:** There's 40 hours of classroom  
6 instruction -- okay? -- where they're pulled off their post --  
7 okay? -- and then there's 12 hours of on-the-job training,  
8 which can consist of when they're working.

9           **THE COURT:** So they're watched by a -- by a Field  
10 Training Officer?

11          **THE WITNESS:** Their Supervisor.

12          **THE COURT:** The Supervisor.

13          **THE WITNESS:** So basically there's a total of 52 hours  
14 mandatory for training in a calendar year --

15          **THE COURT:** For each --

16          **THE WITNESS:** -- but --

17          **THE COURT:** For each Correctional Officer.

18          **THE WITNESS:** Yes.

19          But 40 hours which are -- are -- they're taken off their  
20 post. The other 12 hours can be on the job.

21          **THE COURT:** On the job just watching him to make  
22 sure -- him or her -- make sure that they're -- they're doing  
23 the job right.

24          **THE WITNESS:** Right.

25          **THE COURT:** Okay.

## PROCEEDINGS

1           **THE WITNESS:** And that's also in the DOM.

2           **THE COURT:** Thank you.

3           **BY MR. CUNNINGHAM:**

4           **Q.** And that would include both classroom and on the job or  
5 on -- as to the clothed-body search; right?

6           **A.** Yes. There is a version of the on-the-job searches in the  
7 IST office.

8           **Q.** And you rely on the documentation as to when it happened  
9 and who got it.

10          **A.** That's what we audit, yes.

11          **Q.** Okay. And -- And . . .

12                So you -- you assume that -- that in a particular place  
13 like the central facility at Soledad, all the officers are  
14 trained pretty much the same in a given year about anything --  
15 about clothed-body searches and are put through their paces, so  
16 to speak, to make sure they understand and do it right; fair?

17          **A.** Yeah. When I go to audit that particular institution,  
18 again, was it offered, was it attended, and was it documented?

19          **Q.** Okay.

20          **A.** So those, yeah, we check.

21          **Q.** Okay. Is it right to say that this -- the techniques of  
22 cupping the groin are fairly new addition to the search routine  
23 that -- that is -- has been used in the prison over the years?

24          **A.** No. I just think it's a terminology thing.

25          **Q.** Well, we had testimony from a -- from the former Warden at

## PROCEEDINGS

1 Soledad, that he said, when he heard that that's what they did,  
2 he was shocked or surprised that he had never been trained that  
3 way.

4 Do you go back far enough so that you would know that?

5 **MR. LEWIS:** Objection: Vague, Your Honor. We're not  
6 given any dates or any time frame other than "new."

7 **THE COURT:** Well, if I remember correctly --

8 **MR. LEWIS:** This witness was not here for Warden Curry  
9 so --

10 **THE COURT:** I understand that.

11 Why don't you rephrase -- rephrase the question, if you  
12 can.

13 **MR. CUNNINGHAM:** Um-hmm.

14 **THE COURT:** The objection's sustained.

15 **BY MR. CUNNINGHAM:**

16 **Q.** All right. And as -- When he came to Soledad, he found  
17 this out. He'd been in the system for 35 years. And he said  
18 he was never trained that way, and he'd never done searches  
19 that way involving cupping the groin or cupping the genitals.

20 And he told us he was concerned about that because of the  
21 possibility that an inmate would -- would bring trouble.

22 **MR. LEWIS:** And, Your Honor, another objection:

23 Plaintiff has not said when Warden Curry showed up to the  
24 institution. We're talking many years ago that he showed up,  
25 so that 35 years-plus when the Warden showed up.

## PROCEEDINGS

1           **THE COURT:** I understand.

2           **MR. CUNNINGHAM:** He --

3           **THE COURT:** I think the testimony speaks for itself  
4 that the Warden was assigned as the Warden of Soledad.

5           **MR. LEWIS:** Yes, but this witness is not aware of  
6 that.

7           **BY MR. CUNNINGHAM:**

8           **Q.** Starting in May 2006, that's when he came to Soledad, and  
9 that's when he told us he found this out.

10          **A.** At that particular time this document was approved by  
11 C Post in 2003.

12          **Q.** Yes.

13          **A.** As a warden, he's not required to go through block  
14 training.

15          **Q.** I understand that.

16               But in terms of the newness of it, in terms of the  
17 difference from what he had learned and practiced for  
18 previous -- during his previous career up until May of 2006,  
19 he'd never heard of that. He had to make a whole special  
20 inquiry about it.

21          **A.** Sir, and I hope I don't offend you, but I think -- like I  
22 said, I think this is just a terminology thing.

23          **Q.** Uh-huh.

24          **A.** So if I didn't use the word "cup my hand," if I said, "I  
25 have to use the entire front of my hand," tell me what the

## PROCEEDINGS

1 difference is.

2 Q. Uh-huh. Well, I don't think it's a difference.

3 THE COURT: Let's not get argumentative here.

4 MR. CUNNINGHAM: No.

5 THE COURT: And, counsel, why don't we move on.

6 MR. CUNNINGHAM: Okay.

7 BY MR. CUNNINGHAM:

8 Q. If all the officers are given the same training, and one  
9 officer gets a whole set of 602s filed against him for the way  
10 he's doing the searches involving grabbing the genitals,  
11 squeezing the genitals, and no other officers are complained  
12 against by any of the prisoners, would that -- in your mind,  
13 would that indicate that there's something really wrong going  
14 on here?

15 A. I would definitely look into it as a Supervisor.

16 Q. And would you assume that -- Or -- Or would it be your  
17 first reaction that, "Well, they're -- they might be making  
18 this up"?

19 A. The inmates?

20 Q. Yeah.

21 A. Well, you're asking me my opinion; right?

22 Q. Yeah.

23 A. Okay. In my professional opinion, if there's a 602,  
24 that's a sworn Peace Officer. So unless I -- I'm not going to  
25 speculate anything. So I'm going to do my investigation and

## PROCEEDINGS

1 let the facts lead me where they may end up.

2 But I have to believe a sworn Peace Officer.

3 **Q.** Uh-huh. You have to believe him regardless?

4 **A.** No. You're asking in my professional opinion.

5 **Q.** Yeah.

6 **A.** So just on the face of things, if an inmate is accusing  
7 somebody of this, I -- I'm not going to say, "Oh, yeah, the  
8 inmate's right." I'm just saying this is a sworn Peace  
9 Officer. And I take my oath very seriously, so I would hope  
10 that that sworn Peace Officer would do the same.

11 **Q.** All right. But if you make an investigation, there's no  
12 way to prove whether it happened or didn't happen in a given  
13 case; right? There's no evidence that -- outside of what  
14 actually happened in the gesture with the fingers or not; isn't  
15 that true?

16 **MR. LEWIS:** Your Honor, we're getting highly  
17 speculative and really long on this one.

18 **THE COURT:** Well, I think he's sort of plowing the  
19 same ground now again.

20 I think it is getting somewhat speculative. I'll sustain  
21 counsel's motion.

22 **BY MR. CUNNINGHAM:**

23 **Q.** Would it be right -- Would you say, as -- If you're  
24 investigating it, you come back and say, "Well, it -- there's  
25 no substantiation of the fact that he squeezed the genitals,

## STOLTENBERG - REDIRECT / LEWIS

1 so, therefore, we're going to deny the 602"?

2 **A.** No. There's other measures that could be put in place.

3 The thing about it is if -- if it continually happens,  
4 maybe it's a training issue. I don't know.

5 But you're asking me to formulate an opinion based on what  
6 has happened. I have not seen any documentation. I haven't  
7 been present for any of that --

8 **Q.** I understand.

9 **A.** -- and so --

10 **Q.** I understand.

11 **A.** -- it's very -- very vague and ambiguous.

12 **Q.** Not to the person whose genitals are squeezed.

13 **THE COURT:** All right. Let's not --

14 **MR. CUNNINGHAM:** I'm done.

15 Thank you, Lieutenant, and thank you for your candor. I  
16 understand this is difficult for you not having known it?

17 **THE COURT:** Any redirect.

18 **MR. LEWIS:** Yes, Your Honor, to clarify some exhibits  
19 actually, Your Honor.

20 **THE COURT:** All right. Proceed.

21 **REDIRECT EXAMINATION**

22 **BY MR. LEWIS:**

23 **Q.** Lieutenant Stoltenberg, I showed you what I previously had  
24 identified at Defendant's A3, and that is the 2007 DOM.

25 **A.** Right.



1 Q. And you saw that previously; right?

2 A. Yes.

3 Q. Okay. I'll represent to you that that actually is an  
4 error.

5 This is Defendant's Exhibit A3. I'd like you to look at  
6 this document right here (indicating) and that document  
7 (indicating). Tell me what that document right there is.

8 A. This is the correct -- most recent version of the DOM.

9 Q. And when you say the most recent version --

10 A. It's the 2013 version.

11 Q. Okay. Do you see a section on that page that involves  
12 clothed-body searches of male inmates?

13 A. Yes.

14 Q. Could you look at that section and tell me if that  
15 accurately describes what current officers are supposed to do  
16 with regard to why they conduct clothed-body searches?

17 A. (Examining document.)

18 "Custody post orders shall require random  
19 clothed-body search of inmates. When reasonable  
20 suspicion is established, random searches, should be  
21 no more frequent and necessary to control contraband."

22 The only difference was, it talked about female and  
23 transgenders.

24 Q. All right. And then if you could look back at the exhibit  
25 that I showed you earlier, the 2007 DOM.

1           Are those sections substantially similar regarding why  
2 clothed-body searches are conducted or the policies behind  
3 them?

4           **MR. CUNNINGHAM:** I'm sorry, counsel. Can we have the  
5 section again?

6           **THE WITNESS:** It's just a different section.

7           **BY MR. LEWIS:**

8           **Q.** And what section number is that?

9           **A.** In the new DOM, it's 52050.16.4.

10          **MR. CUNNINGHAM:** So that's the . . .

11                               (Counsel confer.)

12          **MR. CUNNINGHAM:** All right. 16.3 and 1 --

13          **BY MR. LEWIS:**

14          **Q.** .3 for male inmates?

15          **A.** Yes.

16          **Q.** .3.

17          **MR. CUNNINGHAM:** And that's the 2013 version.

18          **MR. LEWIS:** That's the 2013 version.

19          **MR. CUNNINGHAM:** But the testimony is that it's the  
20 same as 2007.

21          **BY MR. LEWIS:**

22          **Q.** Is it substantially similar to this?

23          **A.** Yes.

24          **Q.** And so, basically, it says that officers can conduct  
25 clothed-body searches randomly; can't they?

1     **A.**    Yes.

2     **Q.**    And they do that because there are legitimate safety and  
3     security concerns behind for motivating those searches;  
4     correct?

5     **A.**    Right.

6     **Q.**    And those searches do include searches of the groin area?

7     **A.**    Right.

8           **THE COURT:** Counsel, we've gone over this already.

9     **BY MR. LEWIS:**

10    **Q.**    So, then, this 2007 document that I showed you is  
11    substantially similar to the 2013.

12    **A.**    Correct.

13    **Q.**    Okay.

14                   (Pause in proceedings.)

15           **MR. LEWIS:** No further questions, Your Honor. Thank  
16    you.

17           **THE COURT:** I just have one brief question.

18           Which was the operative Department Manual in May of 2007?  
19    The ones you have in front of you.

20           **THE WITNESS:** This one right here (indicating).

21           **THE COURT:** That's marked as --

22           **MR. LEWIS:** That will be Defense Exhibit Delta, D.

23           **THE COURT:** Delta.

24           **THE WITNESS:** The 2007 version.

25           **MR. LEWIS:** The 2007 version.

1           **THE COURT:** That was the one that was operative at the  
2 time that the incident took place in May of 2007.

3           **THE WITNESS:** Correct.

4           **THE COURT:** Okay. Thank you.

5           (Defendant's Exhibit D marked for identification)

6                           **RECROSS-EXAMINATION**

7           **BY MR. CUNNINGHAM:**

8           **Q.** And the purpose of the random searches is to -- is to  
9 impede the flow of contraband; correct?

10           **THE COURT:** It's been asked and --

11           **MR. CUNNINGHAM:** Foundational.

12           **THE COURT:** -- answered.

13           **MR. CUNNINGHAM:** Foundational.

14           **THE WITNESS:** Yes.

15           **BY MR. CUNNINGHAM:**

16           **Q.** And that prisoners know that; right? The prisoners are  
17 told as well when they're told that they're going to be given  
18 clothed-body searches, and God knows they go on enough so that  
19 they know perfectly well they run the risk if they're  
20 trafficking in contraband.

21           **MR. LEWIS:** That's actually speculative and  
22 argumentative; assumes facts.

23           **THE COURT:** If he knows, he can answer the question.

24           **THE WITNESS:** Sir, they're given the Title 15 in R&R  
25 when they're in process. And in Title 15, under 3287, it tells

## ABANICO - DIRECT / QUINN

1 them that they can expect this.

2 **MR. CUNNINGHAM:** All right. Thank you.

3 **THE COURT:** Anything further from this witness?

4 **MR. LEWIS:** Nothing, Your Honor. Thank you.

5 **MR. CUNNINGHAM:** No, Your Honor.

6 **THE COURT:** Okay. Thank you very much, Lieutenant.

7 (Witness excused.)

8 **THE COURT:** Next witness?

9 **MR. QUINN:** Your Honor, defendants call Officer  
10 Abanico.

11 **THE COURT:** All right. And let me ask counsel: Will  
12 this be your last witness? Do you have another?

13 **MR. QUINN:** No. This is the last witness, Your Honor.

14 (Pause in proceedings.)

15 **THE COURT:** Let me remind you, Officer, you remain  
16 under oath.

17 **THE WITNESS:** Yes, sir.

18 **THE COURT:** All right. You can sit down.

19 **IRWIN ABANICO,**  
20 called as a witness for the Defendants, having been previously  
21 duly sworn, testified further as follows:

22  
23 ///

24  
25

DIRECT EXAMINATION

BY MR. QUINN:

Q. Good morning, Officer.

A. Good morning, sir.

Q. How long have you worked for the Department of Corrections?

A. Nine years, sir.

Q. And where do you currently work?

A. I work for Correctional Training Facility in Soledad, California.

Q. And what is your current job title?

A. I'm a Correctional Peace Officer; I'm also a Training Instructor.

Q. And what are your responsibilities as a Correctional Officer?

A. For the safety of the institution, staff and inmates and especially the public.

Q. And what are your responsibilities as a Tactical Instructor?

A. As Tactical Instructor, my responsibility is to train other officers, Sergeants and Lieutenants, custody staff, to maintain their off-post training, their annual training, and also on-the-job training.

Q. And does this training -- Does this training include training other Correctional Officers concerning body searches?

## ABANICO - DIRECT / QUINN

1     **A.**    Yes, sir.

2     **Q.**    I'd like to turn to some questions about your background.

3           Where are you from originally?

4     **A.**    From the Islands of the Philippines, sir.

5     **Q.**    And is English your first language?

6     **A.**    No, sir.

7     **Q.**    What is your --

8     **A.**    It's Tagalog, Filipino.

9     **Q.**    Okay. Did you attend high school in the Bay Area?

10    **A.**    Yes, sir.

11    **Q.**    Are you married?

12    **A.**    Yes, sir.

13    **Q.**    How long have you been married?

14    **A.**    Eight years.

15    **Q.**    Where did you meet your wife?

16    **A.**    We met at church, sir.

17    **Q.**    And are you still active in that church?

18    **A.**    Yes, sir, I am.

19    **Q.**    Did you have any children?

20    **A.**    Yes, sir, I do. I have a daughter of six and a son of two  
21    years old.

22    **Q.**    Okay. And what did you do after obtaining your high  
23    school diploma?

24    **A.**    After my high school diploma, I went straight to the  
25    United States Marine Corps, sir.

## ABANICO - DIRECT / QUINN

1 Q. And did you have a specific job in the Marine Corps?

2 A. Yes, sir. I was the Motor Transport Operator.

3 Q. And what were your responsibilities as a Motor Transport  
4 Operator?

5 A. I was the marine in charge of delivering items assigned to  
6 us.

7 And as Sergeant of Marines, you're in charge of security  
8 and making sure the staff is maintained, trained, and you have  
9 to deliver any cargo or equipment to point B, so it gets there  
10 properly on time, sir.

11 Q. And did your position -- In that position, did you have a  
12 set procedures or checklist that you used to work in the  
13 field -- in that position?

14 A. Yes, sir. Before a vehicle or motor comes out of the  
15 Motor Pool, we have a list of inspection that we had to met  
16 (sic). And for -- That's called the preventive maintenance.  
17 We check the tires, oil, car. We make sure the vehicle is  
18 properly and able to get to point A and point B with no problem  
19 and get back to safety, sir.

20 Q. And were you promoted in the -- in the Marines?

21 A. Yes, sir. I earned the rank of a sergeant within three  
22 and a half years, sir.

23 Q. So you were essentially a Supervisor --

24 A. Yes, sir.

25 Q. -- for lack of a better term.



## ABANICO - DIRECT / QUINN

1 How many Marines served under you?

2 A. When I was a sergeant, approximately 30 Marines, sir.

3 Q. And were you responsible -- Were you responsible for  
4 ensuring that they followed the applicable procedures and  
5 checklists that were applicable to that -- your particular  
6 field?

7 A. Yes, sir. I'm responsible for each marine, make sure they  
8 do the job properly.

9 Q. And did you eventually leave the military?

10 A. Yes, sir, I left the military.

11 Q. And what was your status when you left?

12 A. When I left the military, 2001, I got out with honorable  
13 discharge.

14 Q. And how soon after leaving the Marine Corps did you join  
15 the Department of Corrections?

16 A. I joined the Department of Corrections within two years,  
17 the reason being the hiring freeze. So while the hiring freeze  
18 going on, I had to make a living and I worked for the Town of  
19 Santa Clara.

20 Q. And now I'd like to turn to some questions about the  
21 training you received in the course of becoming a Correctional  
22 Officer.

23 A. Yes, sir.

24 Q. Did you go to the CDCR training Academy?

25 A. Yes, sir, in Galt, California.

1 Q. And when were you a student there?

2 A. I was there from November 4th, 2004, until February '05.

3 Q. And what subject areas did you receive training in?

4 A. I received the subject of all applies to Peace Officer,  
5 Correctional Officer, like the range, baton, throughout the  
6 baseline response, searches, use of force, and then more, sir,  
7 that leads to becoming a Correctional Peace Officer.

8 Q. Okay. I'd like to show you now what's been previously  
9 marked as, I believe, Defense Exhibit A1, the student handbook.

10 A. Yes, sir.

11 Q. Does that document look familiar to you?

12 A. Yes, sir, it does.

13 Q. And how do you recognize it?

14 A. Sir, because I teach it.

15 Q. And does the document have a date on the front of it?

16 A. Yes, sir, it does. It's C Post approved, December 10,  
17 2003.

18 Q. And does it resemble the training materials that you were  
19 given while you were at the Academy?

20 A. Yes, sir.

21 Q. Can you turn to Page 16 of the materials.

22 A. (Turning to document.)

23 Q. And is that -- is that a section regarding clothed-body  
24 searches?

25 A. (Examining document.)

1 Yes, sir.

2 Q. And after looking at that page, does the section refresh  
3 your recollection regarding how you were trained to conduct  
4 clothed-body searches in the groin area?

5 A. Yes, sir.

6 Q. And does that page tell you how to search a certain  
7 portion of the inmate's body?

8 A. Yes, sir. It tells you from left groin, right groin, all  
9 the way down to your groin area.

10 Q. Does the training -- Or does the document there refer to  
11 the practice of cupping the groin as part of a clothed-body  
12 search?

13 A. Yes, sir, for male inmates.

14 Q. And, again, this is how you were trained to conduct the  
15 clothed-body searches at the Academy.

16 A. Yes, sir.

17 MR. QUINN: At this time, Your Honor, we'd like to  
18 have Officer Abanico, if possible, demonstrate how he was  
19 trained --

20 THE COURT: All right.

21 MR. QUINN: -- to conduct the clothed-body searches.

22 We have an individual who's willing to be subject of the  
23 search.

24 THE COURT: Fine.

25 MR. QUINN: Where would you like us to . . .

## ABANICO - DIRECT / QUINN

1           **THE COURT:** I don't know. Probably -- Well --

2           **THE CLERK:** I can raise it.

3           **THE COURT:** Do you mind doing it over there? Does  
4 that work?

5           **MR. QUINN:** That's fine, or the doorway might be  
6 closer to the jury.

7           **MR. LEWIS:** The door might be better, Your Honor.

8           **THE COURT:** Oh, all right. I want to make sure the  
9 jury sees what's going on.

10           If you feel comfortable, just stand up and observe it.

11           **MR. QUINN:** So, Officer, you can come down.

12           **THE WITNESS:** (Witness approaches doorway.)

13           **THE COURT:** So can all of you see? That's the  
14 important thing.

15                               (Pause in proceedings.)

16           **THE WITNESS:** I start --

17           **THE REPORTER:** I can't hear him, Judge.

18           **THE COURT:** You have to speak up because the reporter  
19 has to take this down.

20           **THE WITNESS:** I ask the inmate to take everything out  
21 of his pocket.

22           **VOLUNTEER:** Okay.

23           **THE WITNESS:** First of all, after his I.D. is given to  
24 me, "Place your hands on the wall. Okay. Step back. Spread  
25 your feet out."

## ABANICO - DIRECT / QUINN

1       The reason I'm doing this, so I have access to the body so  
2       it's easier for me to see the body.

3       My left hand will be right here on the upper body  
4       (indicating). In the position, in the stance, if he's  
5       combative, I would have to either step back or pretty much take  
6       an action what I need to do for safety and myself.

7       From here, I check the collar. I check the collar because  
8       a lot of inmates would hide contraband in here (indicating). I  
9       check the collar.

10      From here, I ask him, "I'm going to pat you down." I do  
11      the front, to the back, to the armpit.

12      From here, I check the front, the front, the side, and the  
13      back.

14      From here, I check the waist area, make sure there's  
15      nothing hidden in the pocket area. So I'm going to check that  
16      area. At the same time, we obtain a visual on him.

17      So once that side is done, I go down to the leg. And here  
18      I'm going to bend down right here (indicating), all the way  
19      down to his ankle. If I choose to, I can ask him to remove his  
20      shoes but I'm not going to do that today.

21      I move to the front, all the way down to his pocket and to  
22      the back.

23      Now I'm going to search the inside of his thigh. All the  
24      way down to his pocket; okay?

25      From then on, I'm going to switch my position from here

1 (indicating) to here (indicating) and my hand going back for  
2 protection, for -- to protect myself and obtain advantage.

3 Same thing on the opposite. I'm going to check the  
4 sleeve, all the way down to the armpit.

5 Then I go to the front area of the chest, all the way down  
6 to his abdominal. To the side, and to the back, now checking  
7 the waist area for any kind of contraband.

8 From here, I'm going to check the pants, the leg. I go  
9 down to the front, going up to the side, going back to the  
10 back. I'm going to search the inside of his thigh.

11 From here, I'm going to zip across -- okay -- cup the  
12 groin area all the way down to the front. I'm going to say,  
13 "Sir, have a good day."

14 If I find any contraband on him, or find anything, I'm  
15 going to call for a Supervisor, request the Supervisor approval  
16 for an unclothed-body search because there could be something  
17 in his groin area. So I'm going to ask for approval.

18 If he says yes, then you do whatever you got to do to get  
19 the contraband. If it's not, I'm going to say, "Sir, have a  
20 good day," and step away, and he goes on his way.

21 **THE COURT:** All right. If you'd take the stand again.

22 **THE WITNESS:** (Resuming stand.)

23 **BY MR. QUINN:**

24 **Q.** And, Officer Abanico, what you just demonstrated is how  
25 you conduct clothed-body searches at CTF; correct?

1     **A.**    Every time, sir.

2     **Q.**    When did you graduate from the Academy?

3     **A.**    February 2005, sir.

4     **Q.**    And after graduating, where were you assigned to work?

5     **A.**    I was -- I was assigned at Baker Wing first watch, which  
6    is from -- it's a grave yard shift from 10 p.m. to 6 a.m.

7     **Q.**    And you were a Tier Officer there; correct?

8     **A.**    Yes, sir.

9     **Q.**    And how long were you working as a Tier Officer.

10    **A.**    For Baker Wing, first watch, approximately eight months.

11    **Q.**    And after those eight months, what position were you moved  
12   to?

13    **A.**    I got moved to Charlie Wing, third watch, which is swing  
14   shift, from 2 p.m. to 10 p.m. I was a Security Officer.

15    **Q.**    And --

16           **THE COURT:** Counsel, I'm sorry, which institution are  
17   you talking about?

18           **MR. QUINN:** CTF.

19           I'll just ask the question.

20    **BY MR. QUINN:**

21    **Q.**    Since graduating from the Academy, you've been stationed  
22   at CTF your entire career?

23    **A.**    Yes, sir.

24    **Q.**    And just to reiterate: You were -- After eight months as  
25   a Tier Officer, you were moved to the position of Security

## ABANICO - DIRECT / QUINN

1 Officer; is that correct?

2 A. Yes, sir.

3 Q. What were your duties as a Security Officer?

4 A. As Security Officer, make sure the door, only inmates is  
5 coming out with approval, or pass coming out, or to go into the  
6 yard, to go into chow, to go into church.

7 As long as they have a pass, then I let them out. If they  
8 don't have a pass, then, of course, they can't come out.

9 Q. And you were responsible for a particular part of the  
10 prison; is that correct?

11 A. Yes, sir.

12 Q. What --

13 A. It's pretty much the -- the door and also, when there's  
14 inmate movement, the corridor.

15 Q. And how many inmates were in the section that you were  
16 responsible for?

17 A. For one Wing, approximately 250 inmates.

18 Q. And as a Security Officer, did you conduct clothed-body  
19 searches?

20 A. Yes, sir.

21 Q. And when were these -- When would the searches be  
22 performed?

23 A. It would be performed any time of day, during massive  
24 movements, or pretty much any time of the day, sir.

25 Q. And where did you typically conduct searches during this



1 period?

2 A. In the corridor.

3 Q. And how would you identify an inmate to be searched?

4 A. Pretty much I just pick a random inmate out of the crowd.

5 Q. And are other officers -- Would other officers typically  
6 be in the area while you're conducting the searches?

7 A. Yes, sir. There would be someone always with me, always  
8 covering me.

9 Q. And would other inmates be present or walking by typically  
10 when you were doing a search?

11 A. Yes, sir, sometimes inmates would be walking by passing  
12 around, yes.

13 Q. What kind of things would you be looking for during those  
14 searches?

15 A. I would be looking for any kind of contraband, drugs,  
16 tattoo paraphernalia, any pretty much unauthorized items that  
17 they're not supposed to have.

18 Q. And have you found contraband on inmates during previous  
19 searches?

20 A. Yes, sir. I have found drugs, marijuana; I've found a  
21 tattoo paraphernalia in the groin area, and I also found a  
22 razor blade in their waist in the corridor.

23 Q. Officer Abanico, do you obtain any sexual gratification  
24 from conducting these type of searches?

25 A. No, sir.

1 Q. Now, several of the plaintiffs have noted during the  
2 previous few days, past few days, that you frequently use the  
3 term "sir" during your interactions with inmates; is that  
4 correct?

5 A. Yes, sir, I do.

6 Q. And why do you use that term in addressing the inmates?

7 A. Because I want to give the inmates the courtesy and  
8 respect of calling them "sir" instead of "inmate."

9 Q. And we also heard yesterday Warden Curry, and partly  
10 today.

11 Warden Curry said he met with you on a single occasion  
12 regarding clothed-body searches.

13 Do you recall that meeting?

14 A. No, sir. It's been long, no, sir.

15 Q. So you're not saying it didn't happen. You just don't  
16 have a recollection of it.

17 A. I have no recollection of it, sir.

18 Q. As a Security Officer during this time in the mid-2000s,  
19 would you receive refresher training regarding searches,  
20 clothed-body searches at CTF?

21 A. Yes, sir.

22 Q. And this type of training was performed at the prison at  
23 CTF?

24 A. It would be performed, yes, sir, at CTF.

25 Q. And what kind of refresher training would you receive in

1 connection with clothed-body searches?

2 **A.** We would do also any kind of on-the-job training, like use  
3 of force, report writing, restraint -- application of  
4 restraints.

5 And for off-post training, we pretty much -- The 40 hours  
6 that the Lieutenant was talking about, we pretty much teach  
7 range, use of firearms, the baton. We teach how to respond,  
8 searches, report writing, chemical agent, using pepper spray  
9 deploying chemicals. So various types, sir.

10 **Q.** And the institution would have kept a record of the  
11 training; correct?

12 **A.** They would have in-service training records in the  
13 personnel file.

14 **Q.** And in-service training records are maintained on each  
15 officer; correct?

16 **A.** Yes, sir.

17 **Q.** I'm going to show you now what's been marked as Exhibit  
18 A -- Defense Exhibit A4.

19 **A.** (Examining document.)

20 **Q.** Do you recognize that document?

21 **A.** Yes, sir, I do.

22 **Q.** What is it?

23 **A.** It's the In-Service Training Staff Report.

24 **Q.** And is it your In-Service Training Staff Report?

25 **A.** Yes, it is, sir.

1 Q. Does the document refer to any training you received on  
2 clothed-body searches?

3 A. (Examining document.)

4 Yes, sir, it does.

5 Q. And did the training you received in 2006, it concern --  
6 it concerned those searches; correct?

7 A. Yes, sir.

8 Q. Was the training similar to the training you received at  
9 the Academy, to the best of your recollection?

10 A. Yes, sir.

11 Q. I want to turn briefly to your position as Range Master  
12 and Tactical Instructor at the facility.

13 When did you become a Training Officer?

14 A. I became a Training Officer 2007.

15 Q. And what certifications do you possess?

16 A. I'm a certified Range Master, which is, we pretty much  
17 teach other cops -- pretty much, we certify them on using the  
18 firearm, which is with a rifle and a pistol. And also Range  
19 Master's chemical instructor, which we have pepper spray and  
20 other chemicals we have in the institution. And also Impact  
21 Munition Instructor, which is a less lethal weapon that fires a  
22 foam -- foam baton -- foam rounds out of the weapon.

23 I'm also certified instructor for baton, extendable baton.

24 Also certified instructor for relative base on the spine,  
25 which is a relative base on the spine is when something going

1 on in the prison system, we pretty much instruct officers of  
2 what to do if something has happened.

3 I'm also certified to teach first aid, CPR with EMS and  
4 also with the American heart. Pretty much, I'm certified for  
5 the majority of the lesson plan that CDC or CTS has to offer.

6 **Q.** Okay. Now, are you certified to give training in  
7 clothed-body searches?

8 **A.** Yes, sir. Every officer is certified to teach those  
9 curriculum.

10 Some officers are pretty much certified for other things,  
11 like Range Master, baton, and response, but those lesson plans,  
12 any certified instructor could teach those.

13 **Q.** And do you instruct -- In the training that you provide  
14 regarding clothed-body searches, do you instruct officers to  
15 cup the groin during such searches?

16 **A.** Yes, sir, I instruct every custody staff to do that.

17 **Q.** In the clothed-body search procedures, they're  
18 substantially similar or identical to the procedures that were  
19 in effect in 2006?

20 **A.** Yes, sir.

21 **Q.** And they're still being taught today.

22 **A.** They're still being taught as of today, yes.

23 **MR. QUINN:** Those are all the questions I have.

24 **THE COURT:** All right. Thank you.

25 Cross-examination.

## ABANICO - CROSS / CUNNINGHAM

1           **MR. CUNNINGHAM:** Thank you, Judge.

2                           **CROSS-EXAMINATION**

3           **BY MR. CUNNINGHAM:**

4           **Q.** You testified the other day that you don't remember any  
5           302's -- 602s -- I'm sorry -- that were filed against you for  
6           searches in 2006 and 2007; right?

7           **A.** Not that I recall, because those years have been -- 2006,  
8           '07, is many years, sir, so . . .

9           **Q.** That was when you were first working at Soledad; right?

10          **A.** Sir?

11          **Q.** You were first at Soledad in 2006, 2007; right?

12          **A.** Yes, sir, I was at Soledad 2006, 2007.

13          **Q.** Um-hmm. And in demonstrating the technique that you use  
14          searching -- and correct me if I'm wrong -- when you have your  
15          hand on the collar -- right, your one hand, is that right? --  
16          on the collar of the person -- of the prisoner you're  
17          searching.

18          **A.** Upper back, yes, sir. I have it on the upper back.

19          **Q.** And you do the other patting with your other hand?

20          **A.** With the free hand, yes, I do.

21          **Q.** One side, the other side; right?

22          **A.** Right, sir.

23          **Q.** And you said the other day, you go down -- There's  
24          actually four sides of the leg that you pat down; right?

25          **A.** Yes, sir, you're right. There's four sides of the leg.

1 Q. Okay. And when you do the inside, are you reaching all  
2 the way around from the back, and do you reach through -- I  
3 mean, to the front like that (indicating), or are you reaching  
4 through from the back (indicating)?

5 A. What do you mean around the front like that, sir?

6 Q. Where you are reaching around the inmate's hip and you're  
7 going down inside of the leg (indicating) from the groin.

8 A. Can you be -- refine that, sir, because I'm not  
9 understanding what you're saying.

10 MR. CUNNINGHAM: Where is Jeff? Come on up here.

11 THE COURT: Well, I think what counsel's asking is, do  
12 you put your hand around the body and go with your hand on the  
13 front of the inmate, or do you place your hand between his legs  
14 and go behind the inmate?

15 BY MR. CUNNINGHAM:

16 Q. So I'm asking, when you get -- you do the back of the leg  
17 (indicating)?

18 A. Yes, sir.

19 Q. You do the side of the leg (indicating)?

20 A. Yes, sir.

21 Q. You do the front of the leg (indicating)?

22 A. Okay.

23 Q. And you do the inside of the leg (indicating); right?

24 A. Yes, sir.

25 Q. When you do the inside of the leg, are you reaching around

1 to the front like this (indicating) from the back, or are you  
2 coming in from the back here (indicating)?

3 A. I'm coming from the back, sir.

4 Q. So you come back around from the front. The -- When you  
5 do the inside of the leg, you're down here (indicating).

6 A. Yes, sir.

7 Q. Okay. And is that when you'd also cup the groin?

8 A. At the end, that's when I cup the groin.

9 Q. At the end of the second leg?

10 A. Yes, sir.

11 THE COURT: Are we done with the -- with --

12 BY MR. CUNNINGHAM:

13 Q. The inside of the second leg?

14 A. Yes.

15 MR. CUNNINGHAM: Thank you, Mr. Wozniak.

16 THE COURT: I'm assuming you didn't find anybody.

17 MR. CUNNINGHAM: Thank you, Judge, for pointing that  
18 out.

19 BY MR. CUNNINGHAM:

20 Q. So it's the last thing you do.

21 A. Yes, sir.

22 Q. And do you at that point -- So is there -- Do you have a  
23 habit of one side first, then the other side?

24 A. I always start off with the right side first.

25 Q. So you're doing the right side with your left hand on the



## ABANICO - CROSS / CUNNINGHAM

1 back and you're using your right -- and you're on the right  
2 side of the prisoner.

3 **A.** Say again, sir?

4 If I was doing the right side, my left hand will be in the  
5 back, my right hand was free to do the searches on the right  
6 side, sir.

7 **Q.** And then you switched to the left side.

8 **A.** Yes, sir.

9 **Q.** So when cupping of the groin is the last thing, that's  
10 done normally with the left hand; right?

11 **A.** Yes, sir.

12 **Q.** And do you reach through the legs and go across the front  
13 of the body, then, from pocket to pocket the way the Lieutenant  
14 testified?

15 **A.** Pretty much I do the same thing the Lieutenant says, from  
16 pocket to pocket, the groin area, switch to the back.

17 **Q.** So you're coming through the legs and doing the pocket to  
18 pocket and then pulling your hand back through and sweep the  
19 groin; is that right?

20 **A.** Say it again, sir?

21 **Q.** You -- You come through the legs to go from pocket to  
22 pocket on the front, and then you bring your hand back through,  
23 out from under, and that's when you sweep the groin itself.

24 **A.** Yes, sir. That's the way I demonstrated, sir.

25 **Q.** Okay.

## ABANICO - CROSS / CUNNINGHAM

(Pause in proceedings.)

**BY MR. CUNNINGHAM:**

**Q.** Have you -- Have you ever -- Strike it.

You said you also didn't remember any meeting with the Warden.

**A.** Until now, no, sir.

**Q.** And --

**A.** It could have happened; it could have not. I don't recall, sir.

**Q.** Have you ever met with the Warden at the institution for any other reason?

**A.** Since being an instructor, I see him mostly every week, just say, "Hi, sir."

**Q.** Just to pass, like, say "Hello"?

**A.** Just passing by, yes, sir.

**Q.** Not going through his office and sitting down talking.

**A.** His office is way off the building in the in-service training. I usually see him in in-service training for a meeting, or taking a tour, or whatever he feels like doing.

So when I see him, out of respect, sir, "Good morning" or "afternoon."

**Q.** Okay. That happens fairly often; right?

**A.** Once in awhile, sir, it does.

**Q.** Okay.

**A.** It happens.

## ABANICO - CROSS / CUNNINGHAM

1 Q. This is not Warden Curry anymore; right?

2 A. No, sir, it's not.

3 Q. And it hasn't been him for several years; right?

4 A. I believe so, sir.

5 Q. Okay. Do you remember seeing Warden Curry out in the  
6 institution when you were working there, when you were first  
7 working there in those years 2006, 2007?

8 A. When I first worked -- When I first started, I don't know  
9 who's the Warden because there's a lot of people wearing suits,  
10 a lot of people wearing ties, so I wouldn't know who the Warden  
11 is. If I seen him, maybe I seen them. Maybe I have not, sir.

12 Q. Okay. And . . . when you were in the Marine Corps, did  
13 you do clothed-body searches there of other soldiers?

14 A. In the Marines, we are not soldiers, sir. We're Marines.

15 Q. I'm sorry. Beg your pardon. Please don't take it wrong.  
16 As a military man.

17 A. Yes, sir.

18 Q. Was that part of your work, to search people?

19 A. In the Marines, sir, there's no inmates in the Marine  
20 Corps.

21 Q. Okay. So there's -- And you -- There was no inmate --  
22 some inmates -- Marines sometimes get arrested; right?

23 A. There is no inmates in my unit, sir.

24 Q. Okay. And -- And did you ever have a member of your unit  
25 who got in trouble and was arrested and had to be searched?

## ABANICO - CROSS / CUNNINGHAM

1    **A.**    Not that I could recall, sir.  None of my Marines ever got  
2    in trouble during my term, sir.

3    **Q.**    Did you have a nickname in the Marines as Sergeant Crazy?

4    **A.**    Yes, sir.

5    **Q.**    And you have a website -- or AOL -- I mean -- I'm sorry --  
6    an e-mail address now, "Sergeant Crazy"?

7    **A.**    I used to, sir.

8    **Q.**    You don't have it anymore?

9    **A.**    No, sir.

10   **Q.**    Okay.

11   **A.**    It's now "Sergeant Abanico."

12   **Q.**    All right.  Why was it Sergeant Crazy before?

13   **A.**    It was -- Crazy was a nickname given to me by my First  
14   Sergeant way back then.

15   **Q.**    When you were in the Marines?

16   **A.**    Yes, sir.

17   **Q.**    Okay.  And when did you give it up?

18   **A.**    I don't know, sir.

19   **Q.**    But you used it after you got out of the Marines for your  
20   e-mail; is that fair?

21   **A.**    I used -- I kept it for a while because everybody asked my  
22   e-mail address and I don't feel like contacting people to  
23   change my e-mail address.

24           It's like when you change your cellphone number, you have  
25   to call everybody in your cell -- in your phone book, and that

## ABANICO - CROSS / CUNNINGHAM

1 sometimes becomes a hassle. Or sometimes you forget a person  
2 and that person needs to get ahold of you and you can't.

3 That's why in -- for a time, I kept it, because I didn't  
4 want to lose contact with my fellow Marines, because other  
5 Marines keep in touch with me by e-mail. So for a while I had  
6 that e-mail.

7 Q. How come they called you Crazy?

8 A. Sir, I never asked my First Sergeant that question.

9 Q. Okay. But did everybody else use the nickname?

10 A. No, sir.

11 Q. Did anybody else use the nickname?

12 A. They will address me as "Sergeant" or "Corporal." They  
13 would not -- the hierarchy in the Marines -- in hierarchy by  
14 the Sergeant, my -- the Marines would not call me by my  
15 nickname because it's pretty much insubordinate. So they would  
16 call me Sergeant Abanico or Sergeant.

17 Q. Before you had rank, did the other people in the rank call  
18 you Sergeant -- call you Crazy?

19 A. No, sir. They just called me by my last name.

20 Q. Okay.

21 (Pause in proceedings.)

22 BY MR. CUNNINGHAM:

23 Q. I'm sorry. One last question.

24 The Crazy part was only when you were a Sergeant?

25 A. No, sir. That was given to me when I was a Lance

## ABANICO - CROSS / CUNNINGHAM

1 Corporal, the year '90 -- '98 or '99. I'm not too exactly sure  
2 when, sir.

3 Q. Okay.

4 (Pause in proceedings.)

5 BY MR. CUNNINGHAM:

6 Q. And now when you're doing training, you give training on  
7 clothed-body searches, among other things, all the other things  
8 you mentioned; right?

9 A. Yeah, right, sir.

10 Q. And at that time, do you -- Well, strike it.

11 Do you recall the testimony of Lieutenant Stoltenberg  
12 where we saw in the exhibit in the Training Manual that there  
13 were capital letters that said "Do not squeeze the scrotum"?

14 A. Yeah, right, sir.

15 Q. And did you have that Training Manual as something you  
16 used when you were trained?

17 A. Every time we do training, we always have a Training  
18 Manual with us in case a student or a staff member wants to  
19 challenge us and wants to know exactly where we're teaching  
20 that.

21 So we actually show them, "It's right here on this page,  
22 and we're not authoring it, we're not adding to it, we're  
23 pretty much teaching you what's in the lesson plan."

24 Q. And that was the same as you were being trained and also  
25 when you were giving training; is that correct?

## ABANICO - CROSS / CUNNINGHAM

1     **A.**    Yes, sir.

2     **Q.**    Okay.  And when you're training them on clothed-body  
3     searches, do you caution them to be careful not to use a  
4     gesture that would give offense or that would -- the inmate  
5     might resent?

6     **A.**    They -- Every Peace Officer, sir, should know that they  
7     should be professional at all times.

8     **Q.**    So you don't say it.

9     **A.**    As a Peace Officer, sir, we are professional at all times.

10           **MR. CUNNINGHAM:**  I have no further questions, Judge.  
11   Thank you.

12           **THE COURT:**  All right.  Thank you.

13           **MR. QUINN:**  Nothing further, Your Honor.

14           **THE COURT:**  All right.  Officer, you may step down.

15           **THE WITNESS:**  Thank you, sir.

16                               (Witness excused.)

17           **MR. LEWIS:**  We have no further witnesses, Your Honor.

18           **THE COURT:**  Defense rests?

19           **MR. LEWIS:**  Defense rests, Your Honor.

20           **MR. CUNNINGHAM:**  We have this issue.  We have an issue  
21   of --

22           **THE COURT:**  Well, we can resolve that with --

23           **MR. LEWIS:**  We can do that.

24           **THE COURT:**  All right.  Ladies and gentlemen of the  
25   jury, that concludes the evidence portion of the trial.

## ABANICO - CROSS / CUNNINGHAM

1           At this juncture, the parties and myself will now settle  
2 the jury instructions and also prepare the Verdict Form for  
3 you.

4           It's my understanding that we most likely can start  
5 argument first thing tomorrow morning.

6           I'll read the instructions first, then we'll have  
7 argument, and the matter should be submitted to you no later  
8 than noon tomorrow.

9           So what I'd like to do now is, I'll ask you to adjourn,  
10 and I'll see you first thing tomorrow morning at 9 a.m.

11           **THE CLERK:** All --

12           **THE COURT:** Please remember my admonition not to talk  
13 to anyone about this case. Thank you so very much.

14           **THE CLERK:** All rise.

15           (Proceedings were heard out of presence of the jury:)

16           **THE COURT:** All right. Let's -- Let's -- Let's do the  
17 housekeeping things first.

18           Now, what documents did you want marked?

19           **MR. CUNNINGHAM:** Judge, we have the documents from  
20 the -- from the 602 that was filed by . . . the Plaintiff Trask  
21 against Abanico about the . . . when he -- when he testified  
22 that he had a file against him for taking food from prisoners,  
23 taking their dinner trays, taking their stuff.

24           And then he said he was told -- he was -- that -- that his  
25 602 had been withdrawn. And there was a document supposedly



## ABANICO - CROSS / CUNNINGHAM

1 signed by him consenting to the withdrawal. And he objected  
2 that that was not signed by him and that he wanted the 602  
3 reinstated, and it was reinstated.

4 So he has the page here with the false signature on it and  
5 the rest of the file with that 602.

6 He testified about it, and he was concerned that the  
7 document be in the record as well, and I am as well, so . . .

8 **MR. LEWIS:** And just so I can clarify: This is  
9 regarding Mr. Trask?

10 **THE COURT:** I think you -- I believe -- I've forgotten  
11 who cross-examined this witness.

12 **MR. LEWIS:** I think it was me.

13 **THE COURT:** You cross-examined. If I'm not mistaken,  
14 you asked him about, "Didn't you withdraw this 602?"

15 **MR. LEWIS:** I don't think I did ask him, Your Honor.

16 **THE COURT:** All right.

17 **MR. LEWIS:** I think he said, "This was -- This was  
18 falsified. My name was falsified."

19 **THE COURT:** No. But you asked him about whether it  
20 was withdrawn.

21 **MR. LEWIS:** I don't think I asked if it was withdrawn  
22 but I'm not going to state that. I can look at the transcript.

23 But one thing we do have, is, Your Honor, it's highly  
24 extraneous and highly irrelevant because it's not Officer --  
25 there's no allegation Officer Abanico did it. There's no

## ABANICO - CROSS / CUNNINGHAM

1 allegation that Officer -- that Warden Curry did it.

2           **THE COURT:** No. But you used it for -- Basically,  
3 from what I remember, it was used for impeachment to show that  
4 this witness' testimony was not truthful.

5           **MR. LEWIS:** I never submitted this exhibit.

6           **THE COURT:** No. No, no. But --

7           **MR. LEWIS:** I questioned him regarding his complaint  
8 in general, but I didn't request him whether or not he withdrew  
9 it or anything like that.

10           **MR. CUNNINGHAM:** I think it was a question about bias  
11 on Abanico.

12           **MR. LEWIS:** Yes. I -- I mean, I think the fact that  
13 he brought a complaint is biased but Abanico -- there's no  
14 evidence --

15           **THE COURT:** Didn't he say -- If I remember correctly,  
16 somebody said, "And didn't you withdraw this complaint?"

17           **MR. LEWIS:** I don't believe I would have asked that,  
18 Your Honor, but I -- it could be.

19           **THE COURT:** Whoo boy.

20           **MR. LEWIS:** We just -- We just believe it's irrelevant  
21 to -- to say it better.

22           **THE COURT:** No. I think if -- if you asked him  
23 whether he withdrew this complaint --

24           **MR. LEWIS:** We actually have the daily transcript,  
25 Your Honor. I -- I could look that up.

## ABANICO - CROSS / CUNNINGHAM

1           **THE COURT:** All right. Why don't we take a quick  
2 look.

3           **MR. CUNNINGHAM:** Okay.

4           **THE COURT:** If -- If he did, I'll let it in. And if  
5 he didn't, I won't.

6           **MR. LEWIS:** And we believe it was yesterday  
7 afternoon's cross-examination; right?

8           **THE COURT:** Yes, I remember you saying that.

9           Do you have it written down? You're a much better note  
10 taking than I am.

11           **LAW CLERK:** I'll see if I can find it.

12           **THE COURT:** What's this?

13           **THE CLERK:** It's the document with the faked signature  
14 on it.

15           **THE COURT:** I'll look at it later.

16           **THE CLERK:** All right.

17                               (Defense counsel confer.)

18           **THE LAW CLERK:** It happened at 11:35 if that helps.  
19 That cross was at 11:35 yesterday.

20           **MR. LEWIS:** And so I did . . .

21           He says, "Okay. That particular" --

22           **THE COURT:** Read the question and answer.

23           **MR. LEWIS:** I'm sorry. This is Page 269.

24           **MR. QUINN:** 279.

25           **MR. LEWIS:** 279, I'm sorry, of the dailies.

1        "Q. That's fine. But I'm --

2        Let the witness just briefly explain.

3        Okay. That particular 602 . . ."

4        Okay. I'll go back:

5        "Q. And you accused him of preventing you from getting the  
6        medical appointments.

7                "Yes. Can we deal with these one at a time?

8                "Yes.

9                "The inmate food" --

10               This is the answer.

11               "The inmate food. That was a 602 that I asked  
12        to withdraw. However, before I can withdraw it,  
13        someone in the administration -- You're asking me,  
14        sir, about the 602s and I'd like to explain."  
15        So he volunteered that he -- but it wasn't in a response  
16        to a question by me.

17        And then:

18               "Okay. That particular 602, when it was given  
19        to Administration, someone in administration, and I  
20        don't know who, signed my name on it, signed my  
21        number, and dated and withdrew my 602 without my  
22        knowing. And I have a copy of that 602 with the  
23        signature of whoever signed it and it's different from  
24        my signature."

25        He volunteered that. It wasn't a question I asked him

## ABANICO - CROSS / CUNNINGHAM

1 about whether or not he withdrew it.

2 **MR. CUNNINGHAM:** Well, but the witness asked him to  
3 stop and go through the 602s one at a time so he could respond  
4 instead of just saying --

5 **MR. LEWIS:** This is the answer that he gave --

6 **THE COURT:** Yeah, but the answer --

7 **MR. LEWIS:** -- but I didn't ask a question.

8 **THE COURT:** I suppose at the time counsel could have  
9 asked to have it marked and show him the document, so I'm going  
10 to allow the page with the signature in it. All right?

11 **MR. LEWIS:** All right.

12 **MR. CUNNINGHAM:** All right.

13 **THE COURT:** Mark that as what's next in plaintiff's.

14 **MR. CUNNINGHAM:** Should it -- Should it go with the  
15 602, Judge?

16 **THE COURT:** No. Just the page. You can argue it, you  
17 can talk about it, only the page with the signature.

18 **MR. CUNNINGHAM:** All right. And then I have  
19 another --

20 **THE COURT:** Hold on. Hold it. What number is that,  
21 Lisa?

22 **THE CLERK:** That's going to be 15.

23 (Plaintiff's Exhibit 15 marked for identification)

24 **THE COURT:** Plaintiff's 15, objections?

25 **MR. LEWIS:** Is that going to be --

## ABANICO - CROSS / CUNNINGHAM

1           **THE COURT:** Just the face page with the signature.

2           **MR. LEWIS:** With the false signature we were talking  
3 about?

4           **THE COURT:** Yes.

5           **MR. LEWIS:** Objection on relevance grounds, Your  
6 Honor.

7           **THE COURT:** All right. That will be overruled. 15  
8 comes in evidence.

9           (Plaintiff's Exhibit 15 received in evidence).

10          **THE COURT:** Next item.

11          **MR. CUNNINGHAM:** The other item we have at this point,  
12 you may recall that plaintiff Demetrius Huff testified that he  
13 was written up by Abanico for supposedly having an earring that  
14 he wasn't supposed to have --

15          **THE COURT:** Yes.

16          **MR. CUNNINGHAM:** -- and that led to a whole incident.

17           And what he -- What we're asking is if we can add to the  
18 evidence the 115, the disciplinary report that was written  
19 up -- by which in which he was written up for the earring.

20          **MR. LEWIS:** Absolutely not, Your Honor. We object to  
21 this.

22           They have not -- They had a chance to produce this when  
23 the witness was on. They might have discussed it but the  
24 actual document wasn't put in front of him. He didn't have a  
25 copy of it.

## ABANICO - CROSS / CUNNINGHAM

1       In fact, we mentioned during the proceedings that we  
2       didn't have a copy of it. So we cannot -- We think it's highly  
3       improper to allow the document to now come in that was said  
4       they didn't have at the time.

5               **MR. CUNNINGHAM:** I can't --

6               **THE COURT:** It's a document generated by the  
7       Department of Corrections and Rehabilitation?

8               **MR. CUNNINGHAM:** Yes. Yes.

9               **MR. LEWIS:** Yes, Your Honor.

10       But, I mean, this -- the witness had a chance to testify  
11       about it, did not have it in front of him. We didn't have a  
12       chance to question him on it.

13       We don't want to reopen evidence to bring this in because  
14       it's improper. It wasn't there when the witness talked about  
15       it. He even said it wasn't there.

16               **MR. CUNNINGHAM:** He talked about the incident that is  
17       reflected in the document. He testified fully about it and the  
18       only issue here is whether or not the document that reflects  
19       the incident ought to be part of the record.

20               **THE COURT:** Now let me see it.

21                               (Pause in proceedings.)

22               **MR. LEWIS:** Your Honor, to the extent that this is  
23       going to involve any kind of . . .

24               **THE COURT:** Just one second. Let me . . .

25                               (Pause in proceedings.)

## ABANICO - CROSS / CUNNINGHAM

1           **MR. LEWIS:** And, Your Honor, if I may be heard on two  
2 issues --

3           **THE COURT:** Okay.

4           **MR. LEWIS:** -- before you issue your ruling.

5           **THE COURT:** Go ahead.

6           **MR. LEWIS:** To the extent this might be used for  
7 evidence on retaliation, we remind the Court there's no  
8 retaliation issue involving Mr. Huff.

9           Second, plaintiffs are now using this after close of  
10 evidence when Mr. Abanico is not on the stand.

11           He can't address it now. To bring in it would be highly  
12 prejudicial.

13           **THE COURT:** The Defense motion to exclude will be  
14 granted.

15           **MR. CUNNINGHAM:** Are we going to go to lunch now?

16           **THE COURT:** Motions?

17           **MR. LEWIS:** Your Honor. We will make a Rule 50 motion  
18 on various grounds.

19           **THE COURT:** Yeah.

20           **MR. CUNNINGHAM:** I'm sorry. I should have --

21           **THE COURT:** Do you want to do that now? Do you want  
22 to go --

23           **MR. LEWIS:** I think we can do it now. It's 11:30,  
24 Your Honor. I'm willing to push now if you'd like to.

25           **THE COURT:** Okay.



## ABANICO - CROSS / CUNNINGHAM

1 (Pause in proceedings.)

2 **THE COURT:** Obviously, I've anticipated this.

3 There's still three remaining claims, the Eighth Amendment  
4 violation, Warden Curry's liability in the matter, and then the  
5 remaining retaliation claim.

6 **MR. LEWIS:** Yes, Your Honor. We have one argument for  
7 each of them.

8 **THE COURT:** Why don't we start with the retaliation.

9 **MR. LEWIS:** Yes, Your Honor.

10 **MR. CUNNINGHAM:** Judge, let me intervene for a moment.

11 I think it's clear we have abandoned the retaliation claim  
12 on the part of Cleveland.

13 **THE COURT:** Plaintiff moves to -- to -- to strike the  
14 allegations of retaliation from the First Amended Complaint.

15 **MR. CUNNINGHAM:** Yes.

16 **THE COURT:** Any objection?

17 **MR. LEWIS:** No objection.

18 **THE COURT:** Granted.

19 **MR. LEWIS:** And if I'm correct, Your Honor, that is  
20 the only retaliation claim in the case.

21 **THE COURT:** My understanding, after a detailed reading  
22 of the complaint again yesterday with my staff, that that was  
23 the remaining retaliation claim. The other retaliation claim  
24 had basically been stricken through -- at summary judgment.

25 **MR. LEWIS:** And we'd just ask for a clarifying

## ABANICO - CROSS / CUNNINGHAM

1 instruction for that purpose to the jury because they did hear  
2 about it.

3 **THE COURT:** Yes, I will.

4 **MR. LEWIS:** And in the second claim, we'll address  
5 Warden Curry if you feel that's appropriate, Your Honor.

6 **THE COURT:** Yeah. Go ahead.

7 **MR. LEWIS:** First of all, the Rule 50 standard we all  
8 know, but just for clarification.

9 Defendants are entitled to judgment as a matter of law on  
10 certain claims.

11 If a party has failed -- has been fully heard on an issue,  
12 and the Court finds a reasonable jury could not legally  
13 sufficient evidentiary basis to find for that party on the  
14 issue, the Court may resolve the issue against that party.

15 Defendants feel that the claim against Warden Curry should  
16 be -- judgment should be granted in our favor.

17 In order to the order screening the plaintiffs' amended  
18 complaint, the plaintiffs allege that Defendant Curry violated  
19 Plaintiffs' Amendment -- Eighth Amendment rights by failing and  
20 refusing to intervene to prevent the sexual harassment and  
21 misconduct by Defendant Abanico.

22 I do have a copy of the screening order. We can show it  
23 to you if you like.

24 **THE COURT:** I have it. I also have the First Amended  
25 Complaint.

## ABANICO - CROSS / CUNNINGHAM

1           **MR. LEWIS:** Yes, Your Honor.

2           In order to state -- And by analogy, we'll use other  
3 Eighth Amendment cases.

4           In order to state an Eighth Amendment claim for, say,  
5 excessive force against a Correctional Officer or bystander,  
6 plaintiff must allege circumstances demonstrating that these  
7 officers, in the case of Warden Curry, had an opportunity to  
8 intervene and prevent or curtail the violation, such as, enough  
9 time to observe what was happening and intervene to stop it but  
10 failed to do so.

11          Citation to Robert vs. Meecham, 60 F. 3d 430 -- 1436.

12           **THE COURT:** Let me -- Let me -- I'm sorry. Go ahead.

13           **MR. LEWIS:** Comma 1442, Ninth Circuit, 1995.

14           **THE COURT:** One of the issues you're going to address  
15 in this is the fact that the testimony that was read into  
16 evidence regarding Warden Curry specifically said that Warden  
17 Curry, in fact, had Correctional Officer Abanico in his office  
18 to talk about this very issue.

19           **MR. LEWIS:** Um-hmm.

20           **THE COURT:** So he knew about it. I don't say whether  
21 he agreed with it but he knew about it. He knew about the  
22 complaints. He talked at length about what he thought about  
23 these complaints, and yet still he did nothing.

24           I think he indicated he did nothing to intervene in the  
25 sense -- Whether you agree with it or not, there's testimony

## ABANICO - CROSS / CUNNINGHAM

1 that he knew about it and did nothing. He certainly gave his  
2 reasons for it.

3 **MR. LEWIS:** Um-hmm.

4 **THE COURT:** But isn't that sufficient for -- for the  
5 jury enough to determine the liability?

6 **MR. LEWIS:** And there's two issues there. If it is a  
7 failure to intervene claim, that implies a physical presence, I  
8 would believe, and there's been no testimony that Warden Curry  
9 was physically present at any of these searches.

10 Now, he did speak with Officer Abanico but to address  
11 that, we have no information regarding dates. The plaintiffs,  
12 aside from a few -- few isolated instances, have never been  
13 able to provide dates about numerous searches. They have a few  
14 here and there. But there's no information in the record about  
15 when that meeting with Officer Abanico was. So there's --

16 **THE COURT:** I think it's clear.

17 **MR. LEWIS:** -- no way of telling --

18 **THE COURT:** I think it's clear. I don't mean to  
19 interrupt.

20 But I think it's clear that one can infer it was after at  
21 least some of the searches that are in question.

22 **MR. LEWIS:** And that would be a fair assumption  
23 because obviously that's how the Warden got the notice.

24 But if it was after some of the searches, we have no  
25 evidence the searches' other retaliatory -- I'm sorry -- other

1 alleged sexual molestation searches occurred after that  
2 meeting.

3 So, therefore, Warden Curry couldn't be held liable for  
4 failing to intervene because there's no evidence in front of  
5 the jury that these searches happened after the meeting. They  
6 don't even know when the meeting was. So, therefore, there's  
7 no way he could have intervened because we don't even know if  
8 the searches occurred after the meet.

9 Now, if there's a supervisory liability hook -- And I  
10 would ask the Court: Is my interpretation correct that this is  
11 a failure to intervene claim and not a supervisory liability  
12 claim.

13 **THE COURT:** Correct.

14 **MR. LEWIS:** All right. So, then, I think that that is  
15 telling right there with the fact that there's no real evidence  
16 in the dates.

17 We have questioned the witnesses and the plaintiffs  
18 regarding dates, and many of them were not able to provide one.  
19 And we don't know when that meeting was.

20 For the third issue --

21 **THE COURT:** Wait, wait, wait, wait. We'll take these  
22 one at a time.

23 **MR. LEWIS:**

24 All right.

25 **THE COURT:** My tentative ruling is to deny the Rule 50

## ABANICO - CROSS / CUNNINGHAM

1 motion as to this point.

2 Do you have anything to add?

3 **MR. CUNNINGHAM:** Well, if your ruling is going to be  
4 to deny it, Judge, no, I won't argue with you.

5 I mean, I should point out, Judge --

6 **THE COURT:** Hold on just a minute.

7 **MR. CUNNINGHAM:** Sure.

8 (Pause in proceedings.)

9 **MR. CUNNINGHAM:** In terms of the timing of the  
10 interview, that the testimony was that it was after he had made  
11 the first inquiry of Deputy Warden Knoll, and then it was after  
12 she -- he had checked back with her again.

13 And we did receive answers. We made some followup  
14 interrogatories.

15 **THE COURT:** There's sufficient -- There's sufficient  
16 evidence, I believe, for both sides to argue that issue. But I  
17 think it should go to -- to the jury.

18 Now, would you be specific as to exactly what this claim  
19 is.

20 **MR. CUNNINGHAM:** The claim of nonintervention?

21 **THE COURT:** Correct. Not supervisory --

22 **MR. CUNNINGHAM:** No, it's not supervisory liability.

23 He was -- He was informed. He said early on the petition  
24 that was filed by Cleveland, the 150 names, he started asking  
25 questions, he said.

## ABANICO - CROSS / CUNNINGHAM

1           He told Ms. Knoll to look into it. He told Lieutenant  
2 Biggs to look into it. He, you know, did what he did and --  
3 and, ultimately, as he said -- I assume I -- I would assume  
4 that somebody would tell him, you know, "You ought to do  
5 something about this because your name is coming up too  
6 much" -- told Abanico.

7           Abanico came and saw him. And he told Abanico, "You've  
8 got to find out a way to do this without generating so much  
9 hate and discontent," and there is a point when they stopped  
10 the searches. The complaints stopped. Nobody's saying he's  
11 doing it anymore.

12           **THE COURT:** All right.

13           **MR. CUNNINGHAM:** That's a year and a half later. A  
14 year and 14 months.

15           **THE COURT:** Based on the arguments that I've heard, I  
16 cannot find as a matter of law against plaintiffs on the  
17 claim -- or against the defendant for the reasons stated, and  
18 that no jury could find in favor of the plaintiff based on  
19 what's been provided to the Court at this juncture. So that'll  
20 be denied.

21           **MR. LEWIS:** Thank you, Your Honor.

22           And, lastly, regarding the Eighth Amendment claims.

23           The defendants believe they're entitled to judgment on the  
24 Eighth Amendment claims by plaintiffs Morris, Huff and Jones,  
25 because the plaintiff -- those particular plaintiffs have

## ABANICO - CROSS / CUNNINGHAM

1 produced no evidence that they suffered physical injury and  
2 were not subject to a sexual act by defendant.

3 Furthermore, the searches conducted on them only resulted  
4 in de minimis injury, if at all, from the isolated, brief  
5 incidents.

6 The PLRA specifically provides that prisoners cannot  
7 recover damages for mental or emotional injuries suffered while  
8 in custody without a prior showing of physical injury or the  
9 commission of a sexual act as defined by Title 18,  
10 Section 2246.

11 The Ninth Circuit has recognized this in *Oliver vs.*  
12 *Keller*, 289 F. 3d 623, 626 to 28, Ninth Circuit, 2002.

13 Basically the Ninth Circuit has construed this provision  
14 to preclude recovery of damages from mental or emotional  
15 injuries unless the prisoner has suffered a physical injury  
16 that is more than de minimis.

17 In this case, we heard testimony that Plaintiff Morris and  
18 Jones identified they were searched by Defendant Abanico only  
19 one time; that they were single search incidences and the  
20 contact with their groin lasted only a few seconds.

21 In the case of Mr. Huff, he testified that his penis and  
22 scrotum were grabbed one time and that the rest of the other  
23 searches involved a fluid and firm sweep of his groin area.

24 None of these inmates testified regarding physical harm  
25 from defendant Abanico's searches and none of them sought



1 medical attention.

2 None of these inmates suffered the sexual harassment that  
3 was egregious, pervasive or widespread sufficient to constitute  
4 a claim under the Eighth Amendment. And that's citing to  
5 Jordan vs. Gardner, 986 F. 2d 151 (sic), Page 1525, Ninth  
6 Circuit, 1993, en banc.

7 Because of this, and because the de minimis injuries are  
8 there, and because there's no damage, no emotional injury or no  
9 medical injury, they can't recover. And because the injury was  
10 so slight, the defendants are entitled as a matter of law as to  
11 those defendants -- as to those plaintiffs.

12 **THE COURT:** Thank you.

13 **MR. CUNNINGHAM:** Judge --

14 **THE COURT:** The Court -- Just a moment.

15 The Court notes the United States vs. Wood, 692 Fd.3d  
16 1041, 2012 case.

17 The Court in that matter, Ninth Circuit . . .

18 The Court noted that:

19 "Sexual harassment or abuse of an inmate by  
20 Corrections Officer is a violation of the Eighth  
21 Amendment."

22 Schwenk vs. Hartford, 204 Fd.3d 1187, Ninth Circuit  
23 2000.

24 "In the simplest and most absolute terms,  
25 prisoners have a clear established Eighth Amendment

1 right to be free from sexual abuse.

2 "The unsolicited touching of a prisoner's  
3 genitalia by prison employees are simply not part of  
4 the penalty that criminal offenders pay for their  
5 defenses against society."

6 Quoting Farmer vs. Brennan, 51 U.S. 825.

7 The Court goes on to argue . . .

8 "Sexual contact between a prisoner and a prison  
9 guard search in a legitimate role is simply a part of  
10 the penalty that criminal offenders pay for their  
11 offenses against society. Where there is no  
12 legitimate penological purpose for a prison official's  
13 conduct, the courts have presumed malicious and  
14 sadistic intent.

15 "We have previously held that a sexual assault  
16 on a prisoner by a prison guard is always deeply  
17 offensive to dignity and is completely void of  
18 penological justification. We, thus, conclude that  
19 Woods' allegations are sufficient to state an Eighth  
20 Amendment claim."

21 And based on that, that will go to the jury.  
22 Rule 50 is denied.

23 **MR. LEWIS:** Yes, Your Honor.

24 We would ask that -- and we will address this at the -- at  
25 instructions -- but that this particular provision regarding

## PROCEEDINGS

1 the recovery of damages without emotion -- or without emotional  
2 damages shown, we'd ask for a jury instruction on that, on  
3 those specifics.

4 **THE COURT:** All right. We can take that up.

5 Do you have anything to add on the defendant's final --

6 **MR. CUNNINGHAM:** No, Judge. You stated it very  
7 completely.

8 **THE COURT:** All right. Thank you.

9 Anything further at this time?

10 **MR. CUNNINGHAM:** No. We'll see you at 1 o'clock for  
11 instructions?

12 **THE COURT:** 1 o'clock, we'll settle jury instructions  
13 and then also the verdict.

14 **MR. QUINN:** Thank you, Your Honor.

15 **MR. CUNNINGHAM:** Thank you, Your Honor.

16 **THE COURT:** Courts' in recess.

17 (Luncheon recess was taken at 11:37 a.m.)

18 **Afternoon Session**

**1:16 p.m.**

19 (Proceedings were heard out of the presence of the jury:)

20 **THE COURT:** All right. Let's go through and settle  
21 the instructions.

22 Before we start, we need to talk about Curry's liability  
23 and how we're framing it because what we did was we took a look  
24 at some of the instructions and it still remains, even though  
25 his failure to intervene, that's a subsection of supervisory

## PROCEEDINGS

1 liability. So --

2 **MR. CUNNINGHAM:** Well, so the issue is, then?

3 **THE COURT:** Which jury instructions are we going to  
4 use?

5 **MR. CUNNINGHAM:** As to -- I think -- well, I mean,  
6 we'll get to it; but I think, you know, the substance of the  
7 charge is a failure to do something. I mean, he -- you can't  
8 say he was supervising the guy in any direct way and he was  
9 doing it; and, therefore, he knew and it's kind of like a  
10 sergeant's responsibility or somebody who's on the scene and  
11 that kind of intervention.

12 **THE COURT:** No, no, no. I mean, look, the evidence,  
13 as I see it, what's going to go to the jury, is that there were  
14 reports filed about this conduct; that the defendant went to  
15 Warden Curry, discussed, apparently, something about this.  
16 Warden Curry testified that he did some independent  
17 investigation, I believe, and then testified as to what he  
18 thought he should or shouldn't do, which included failing to  
19 intervene in the matter, and the question is whether or not  
20 that's a violation.

21 **MR. CUNNINGHAM:** Whether or not what he did was  
22 reasonable response to the information or the charges that were  
23 brought to him, yes.

24 **THE COURT:** Okay.

25 **MR. CUNNINGHAM:** The 150 signatures, I mean, he said

## PROCEEDINGS

1 that's what got him started. In other words, he doesn't even  
2 normally deal with these things; but when he saw -- when that  
3 was put in front of him with so many people making -- saying  
4 the same thing, then he got -- I think he said, "That caught my  
5 attention."

6 And then he began to take the steps that he took that led  
7 him to the point of what we think of as the cover-up to say,  
8 "Oh, no, that must be three or four guys racketeering or  
9 trafficking in something, and the rest of it is all, you know,  
10 phony."

11 And, so, really the essence of it is, in that whole  
12 progress of his activity around the case, is that he was always  
13 trying to find a way. Like Lieutenant Stoltenberg said: I'm  
14 always going to go with the peace officer. You know, I have to  
15 find a way to defend this guy. I have to find a way to protect  
16 this guy in the face of even this 18 whatever it was, 16, 18  
17 602s, and these two petitions, one nine, ten months after the  
18 first one all signed by a lot of prisoners.

19 He found it expedient to say, "Oh, well, that doesn't mean  
20 anything," but that was unreasonable, Judge.

21 **THE COURT:** All right. Well, let's go ahead and start  
22 through some of the other ones and then we can talk about that.

23 **MR. CUNNINGHAM:** All right.

24 **THE COURT:** And I have some additional ones also we've  
25 been sort of going through and taking a look at these.

## PROCEEDINGS

1           **MR. CUNNINGHAM:** Yes. You gave us those.

2           **THE COURT:** All right. Anybody have any objection to  
3 1.1C, Duty of Jury?

4           **MR. WOZNIAK:** No.

5           **MR. CUNNINGHAM:** No.

6           **MR. QUINN:** No.

7           **THE COURT:** Okay. 1.2, Claims and Defenses, as we've  
8 outlined them in the instructions and edited by the parties and  
9 Court on the 4th?

10          **MR. WOZNIAK:** The plaintiffs would request some  
11 changes in light of the testimony.

12          **THE REPORTER:** Counsel, I need you to speak up,  
13 please.

14          **MR. WOZNIAK:** The plaintiffs would request, I think  
15 it's obvious that the "in addition," second paragraph, will be  
16 taken out.

17          **THE COURT:** All right. We'll strike this.  
18 Any objection?

19          **MR. QUINN:** No. The Court removed that claim, so  
20 that's fine.

21          **MR. WOZNIAK:** And then the plaintiffs would also  
22 request that in the second line after "Defendant Abanico," we'd  
23 like to add "grabbing and squeezing of the genitals under cover  
24 of an authorized clothed body search."

25          **THE COURT:** Hold on a second.

## PROCEEDINGS

(Pause in proceedings.)

**THE COURT:** I'm sorry. Excuse me, Counsel.

"They were intentionally pointedly groped, fondled, and molested."

What was the exact testimony?

**MR. QUINN:** That's taken from their Complaint, I believe, the Amended Complaint, the operative Complaint. And the Court has rejected -- Judge Breyer previously rejected an attempt to amend the Complaint and add new claims.

**THE COURT:** Judge White; wasn't it?

**MR. QUINN:** Judge Breyer.

**THE COURT:** How many judges has this gone through?

**MR. QUINN:** It was Judge Fogel, Judge Breyer and --

**THE COURT:** Oh, okay.

**MR. CUNNINGHAM:** But Judge Breyer didn't say anything about claims. He said we were trying to add defendants.

**MR. QUINN:** Well, you were trying to amend the Complaint and -- or change the Complaint and change the defendants and the plaintiffs involved in the claims.

**THE COURT:** Is this the language that's in the Complaint?

**MR. QUINN:** I think I cut and pasted it right from there. We have....

**THE LAW CLERK:** I have it.

**MR. WOZNIAK:** I mean, we're just suggesting to add

## PROCEEDINGS

1 "grabbing and squeezing" because that was the testimony of the  
2 plaintiffs about the specific conduct of Defendant Abanico.

3 **THE COURT:** I understand that, but....

4 (Pause in proceedings.)

5 **THE COURT:** We'll take a look at the Complaint.

6 (Pause in proceedings.)

7 **MR. QUINN:** It's page 4 of the Complaint, line 17.

8 (Pause in proceedings.)

9 **THE COURT:** That is what's in the Complaint; and, two,  
10 what's been described can certainly be called a subset of that.

11 **MR. WOZNIAK:** I can't disagree with you, Judge; but,  
12 you know, we would request that if we could take out  
13 "intentionally and pointedly groped, fondled" and just write  
14 "molested by Abanico and that he grabbed and squeezed  
15 genitals," that's what the plaintiffs are requesting.

16 **MR. QUINN:** They shouldn't be allowed to change their  
17 Complaint or claims that are asserted in their Complaint.

18 **THE COURT:** I think I agree with counsel. That will  
19 be denied.

20 **MR. WOZNIAK:** And then at the end of that first  
21 paragraph, plaintiffs request that "interacting with" be  
22 changed to --

23 **THE COURT:** Let me see, what are we talking about?  
24 Oh, "interacting."

25 **MR. WOZNIAK:** The end of the first paragraph where it



## PROCEEDINGS

1 says, "Meaningful action to prevent Abanico from," and the next  
2 word, "interacting with," we'd request that those be struck and  
3 then "abusing."

4 **THE COURT:** "They claim that although they complained  
5 about the searches and filed formal grievances against Abanico,  
6 prison officials under the supervision of Defendant Curry  
7 failed to take meaningful action to prevent Abanico from..."

8 **MR. WOZNIAK:** "Abusing prisoners." I think that the  
9 gist of this here is that they weren't saying no interaction,  
10 but that he was actually abusing them within his interaction.

11 **MR. QUINN:** I mean, the allegation is that --

12 **THE COURT:** Yeah, nobody's ever said that he couldn't  
13 interact with them or he couldn't -- in fact, nobody ever said  
14 that he couldn't search them. The gist of it is that this was  
15 abusive behavior. The allegation is that it's an abusive  
16 behavior.

17 **MR. QUINN:** True. I mean, but the -- you know, part  
18 of the testimony was whether the allegation is that Curry  
19 should have moved him to a separate section of the prison or  
20 somewhere where he wouldn't have to be interacting with the  
21 inmates in this manner in the sense with regard to doing  
22 clothed body searches.

23 **THE COURT:** How about "interacting or abusing"?

24 **MR. WOZNIAK:** Or we could say "mistreating."

25 **MR. QUINN:** "Interacting or abusing," no.

## PROCEEDINGS

1           **THE COURT:** All right. We'll go ahead with  
2 "interacting or abusing."

3           Anything else on Claims and Defenses?

4           **MR. WOZNIAK:** Yes. In the third paragraph, the fourth  
5 sentence, "Defendants further argue that such searches," that  
6 sentence: (reading)

7           "Defendants further argue that such searches, if  
8 performed in accordance with the Department's training  
9 manual, requires some amount of touching or grabbing of  
10 plaintiffs' groin and buttocks."

11          We're requesting that "grabbing" be taken out because  
12 grabbing is not what the testimony was.

13          **THE COURT:** There was nothing that said it was  
14 appropriate to grab. The testimony was that it was touching.

15          **MR. QUINN:** Can we replace it with "cupping"?

16          **THE COURT:** "Touching or cupping," I think that was  
17 what was said, and we can go ahead and change that. So "some  
18 amount of touching or cupping of plaintiffs' groin and  
19 buttocks."

20          **MR. WOZNIAK:** And then in the next sentence:  
21 (reading)

22          "Defendants also argue that" --

23          **THE COURT:** Hold on. Hold on.

24          **MR. WOZNIAK:** I'm sorry.

25          **THE COURT:** Okay.

## PROCEEDINGS

1           **MR. WOZNIAK:** Ready, Judge?

2           **THE COURT:** Yes.

3           **MR. WOZNIAK:** In the next sentence: (reading)

4           "Defendants also argue that because Abanico's contact  
5           with plaintiffs' groins during the search did not" --

6           **THE COURT:** It should be "groin." No, I guess it's  
7           plaintiffs here, plaintiffs' groins.

8           **MR. WOZNIAK:** (reading)

9           -- "plaintiffs' groins did not last longer than a few  
10           seconds and was consistent with search procedures..."

11           And we're requesting that "because" be changed to "that,"  
12           "and that there is no evidence that plaintiffs were sexually  
13           abused," not "because" but have "that."

14                               (Pause in proceedings.)

15           **THE COURT:** And you want to change "because" to what?

16           **MR. WOZNIAK:** "That."

17           **THE COURT:** That's actually better for you, I think.  
18           What's defense position?

19           **MR. QUINN:** The second "because" -- the second  
20           "because" or the first "because"? I guess the second  
21           "because."

22           **THE COURT:** No. What he wants is -- now we're on the  
23           record. Now I'm mumbling on the record. (reading)

24           "Defendant also argue" -- "Defendants also argue that  
25           because Abanico's contact with plaintiffs' groins during

## PROCEEDINGS

1 the searches did not last longer than a few seconds and  
2 was consistent with search procedures and that there  
3 is" -- "and that there is no evidence that plaintiffs were  
4 sexually abused or molested during the searches, there was  
5 no reason for Curry to intervene in the matter."

6 MR. QUINN: That's fine.

7 THE COURT: Okay.

8 MR. WOZNIAK: The other -- in that sentence there's  
9 another suggested change.

10 THE COURT: Yes. Go ahead.

11 MR. WOZNIAK: So in the last -- after the last comma  
12 there, you know, to add "and, therefore, there was no reason  
13 for Curry to intervene in that matter."

14 THE COURT: "And there was no reason for Curry"? All  
15 right.

16 MR. WOZNIAK: "And, therefore, there was no reason for  
17 Curry to intervene."

18 THE COURT: I don't see any --

19 MR. QUINN: Okay.

20 THE COURT: Okay. So let me read the whole --

21 THE LAW CLERK: And, Judge, strike the  
22 next-to-the-last sentence.

23 MR. WOZNIAK: Oh, yes. Plaintiffs also request  
24 because that's the retaliation part.

25 MR. QUINN: Oh, yeah. Strike that.

## PROCEEDINGS

1           **THE COURT:** All right. So the Claims and Defenses  
2 that are to be read to the jury is as follows: (reading)

3           "Plaintiffs allege that beginning in May 2006 they  
4 were intentionally and pointedly groped, fondled, and  
5 molested by Defendant Abanico under cover of an authorized  
6 clothed body search in violation of the Eighth Amendment.

7           "Plaintiffs argue that the searches were not conducted  
8 in accordance with the rules or with the training Abanico  
9 received. They claim that although they complained about  
10 the searches and filed formal grievances against Abanico,  
11 prison officials, under the supervision of Defendant  
12 Curry, failed to take meaningful action to prevent Abanico  
13 from interacting or abusing prisoners."

14           **MR. WOZNIAK:** Should that be "interacting with or  
15 abusing prisoners"?

16           **MR. QUINN:** I think that should be "interacting with  
17 or abusing prisoners."

18           **THE COURT:** Or what?

19           **MR. WOZNIAK:** "Interacting with or abusing."

20           **THE COURT:** Oh, "interacting with." All right.  
21 "Interacting with or abusing prisoners." (reading)

22           "The defendants deny plaintiffs' claims in their  
23 entirety. Defendants argue that they did not violate  
24 plaintiffs' rights. To the contrary, they argue that  
25 Abanico adhered to the training he received at the

## PROCEEDINGS

1 Correctional Academy while performing such searches.

2 "Defendants further argue that such searches that are  
3 performed in accordance with the Department's training  
4 manual requires some amount of touching or cupping of  
5 plaintiffs' groin or buttocks through their clothes to  
6 accomplish the purpose of the search.

7 "Defendants also argue that because Abanico's contact  
8 with plaintiffs' groins during the searches did not last  
9 longer than a few seconds and was consistent with search  
10 procedures and that there is no evidence that plaintiffs  
11 were sexually abused or molested during the searches and,  
12 therefore" --

13 "And, therefore, there was no reason"?

14 **MR. WOZNIAK:** Yes.

15 **THE COURT:** (reading)

16 -- "and, therefore, there was no reason for Curry to  
17 intervene in the matter.

18 "Accordingly, defendants argue that they did not  
19 violate plaintiffs' Eighth Amendment rights.

20 "Finally, defendants argue that they are entitled to  
21 qualified immunity."

22 Are the parties satisfied with that?

23 **MR. WOZNIAK:** One other thing I would suggest is we  
24 take out "buttocks" because there was really no -- well, was  
25 there?

## PROCEEDINGS

1           **THE COURT:** No, there was testimony about it. There  
2 was testimony about that.

3           Are the defendants satisfied with the Claims and Defenses?

4           **MR. QUINN:** Yeah. The second-to-the-last sentence is  
5 sort of a run-on or third-to-the-last sentence, but I think it  
6 gets the point across.

7           **MR. CUNNINGHAM:** I'm intervening here, Judge, to say I  
8 think the line about qualified immunity should go out. I don't  
9 think we have a qualified immunity situation here, and I don't  
10 think -- I think that terminology is something that would cause  
11 confusion. I think that's really not in the case.

12           **MR. QUINN:** We were going to argue that a qualified  
13 immunity instruction should be included in the jury  
14 instructions.

15           **THE COURT:** Well, let's put 1.2 to the side and move  
16 on.

17           Burden of Proof/Preponderance of the Evidence. And,  
18 again, I will ask the parties, there are no claims here that  
19 require clear and convincing evidence?

20           **MR. CUNNINGHAM:** Correct.

21           **MR. QUINN:** I don't believe so.

22           **THE COURT:** All right. 1.3 okay?

23           **MR. WOZNIAK:** Yeah.

24           **THE COURT:** 1.5, Two or More Parties Different Legal  
25 Rights?

## PROCEEDINGS

1           **MR. WOZNIAK:** Good.

2           **MR. QUINN:** That's fine.

3           **THE COURT:** Standard 1.6, What is Evidence?

4           **MR. WOZNIAK:** Good.

5           **MR. QUINN:** That's fine.

6           **THE COURT:** 1.7, What is not Evidence?

7           **MR. WOZNIAK:** Good.

8           **MR. QUINN:** That's fine.

9           **THE COURT:** 1.8, Evidence for a Limited Purpose?

10          **MR. WOZNIAK:** Good.

11          **THE COURT:** I think there was some -- wasn't there --  
12       yeah, I mean, I guess -- what was limited?

13               No, don't. Who's going to argue this?

14          **MR. CUNNINGHAM:** I'll leave it to him, Judge. I'm  
15       sorry.

16          **THE COURT:** I'm trying to think.

17          **MR. WOZNIAK:** Because the impeachment stuff was all  
18       brought in; right? It wasn't....

19                       (Pause in proceedings.)

20          **THE COURT:** I'm trying to think. The reports that  
21       Curry was shown saying, "Well, you had notice of this," is that  
22       for a limited purpose?

23          **MR. QUINN:** The reports that Curry was shown that were  
24       referenced in his deposition you're referring to?

25          **THE COURT:** Yeah.



## PROCEEDINGS

(Pause in proceedings.)

**THE COURT:** Let's put this to the side. Let's put this to the side. Let's go through the ones that we can all agree on right now, then we'll go through the rest afterwards.

Direct and Circumstantial Evidence?

**MR. WOZNIAK:** Good.

**MR. QUINN:** That's fine.

**THE COURT:** Rulings on Objections?

**MR. WOZNIAK:** Good.

**MR. QUINN:** That's fine.

**THE COURT:** Availability of Witnesses?

**MR. WOZNIAK:** Good.

**MR. QUINN:** That's fine.

**THE COURT:** Taking of Notes as modified?

**MR. WOZNIAK:** That's good.

**MR. QUINN:** That's fine.

**THE COURT:** Bench Conferences and Recesses?

**MR. QUINN:** That's fine.

**THE COURT:** Any objection?

**MR. WOZNIAK:** No.

**THE COURT:** All right. I believe there were some stipulations of fact?

**MR. QUINN:** In the joint pretrial statement.

**THE COURT:** I was going to read those at this time, but actually the parties didn't stipulate to anything yet.

## PROCEEDINGS

1 What we could do is tomorrow before we read the instructions,  
2 do you want to stipulate to these facts?

3 **MR. QUINN:** They're stipulated to in the joint  
4 pretrial statement.

5 **THE COURT:** I know, but it has to be done in front of  
6 the jury. They have to have notice of it.

7 These were ones that were in the pretrial -- these are all  
8 the ones in the pretrial statement.

9 **MR. WOZNIAK:** Right.

10 **THE COURT:** Do you want to stipulate to them tomorrow  
11 in front of the jury, and then I'll read this instruction?

12 **MR. QUINN:** That's fine.

13 **MR. WOZNIAK:** Can I have one brief moment to talk to  
14 Mr. Cunningham?

15 **THE COURT:** Yes.

16 (Pause in proceedings.)

17 **MR. WOZNIAK:** The one we'd like to add to this in the  
18 "clothed body searches are conducted" paragraph, the very last  
19 sentence: (reading)

20 "While searching an inmate's groin, one officer is  
21 also directed to," quote, "cup the groin and check for  
22 contraband."

23 In that section within the handbook or the workbook, that  
24 is where it says "DO NOT SQUEEZE THE SCROTUM" right immediately  
25 after that; and, so, we're requesting that the entirety of that

## PROCEEDINGS

1 phrase be in there.

2           **MR. QUINN:** It seems to me that if they wanted that  
3 phrase in there, they had ample amount of time to put it in the  
4 pretrial statement. It's a little late for that.

5           **THE COURT:** Are you going to stipulate to that or not?

6           **MR. QUINN:** To including that new part?

7           **THE COURT:** Yes, and me reading it to the jury.

8           **MR. QUINN:** I guess it's fine.

9           **THE COURT:** All right. Where do we want it?

10          **MR. QUINN:** It's right after "contraband."

11          **THE COURT:** "Contraband" and then what do you want to  
12 add?

13          **MR. WOZNIAK:** And then it says, "Do not squeeze the  
14 scrotum." "Do not squeeze" --

15          **THE COURT:** "Cup the groin and check for contraband"  
16 and not to?

17          **MR. WOZNIAK:** The way it's written in here, it's a new  
18 sentence, "Do not squeeze the inmate's scrotum. It's in all  
19 caps in here, too. I don't know if you want to do it in all  
20 caps.

21          **THE COURT:** No. I'm just going to read it to them.  
22 "Do not squeeze the scrotum."

23 All right. Any other stipulations?

24          **MR. WOZNIAK:** No.

25          **THE COURT:** All right. Proof?

## PROCEEDINGS

1           **MR. QUINN:** That's fine.

2           **THE COURT:** Okay. Was there any impeachment evidence?

3           **MR. LEWIS:** Yes.

4           **MR. QUINN:** Well, we used some of the depositions for  
5 impeachment.

6           **MR. LEWIS:** Two exhibits, Your Honor, by defendants.

7           **THE COURT:** So how do we want to phrase 2.8,  
8 Impeachment Evidence of Witness?

9           **MR. WOZNIAK:** We were going to suggest "inconsistent  
10 prior statements."

11           **THE COURT:** "The evidence that a witness made  
12 inconsistent prior statements"?

13           **MR. QUINN:** I would just keep, "The evidence that a  
14 witness lied under oath on a prior occasion would be  
15 considered," et cetera, et cetera.

16           **MR. WOZNIAK:** There's nothing that suggests that they  
17 lied. I mean, the differences were two or three seconds versus  
18 three to four seconds or differences of dates.

19           **THE COURT:** That's not lying, no. I think that's  
20 inappropriate to what the testimony was. And I know counsel  
21 cross-examined vigorously on whether it was one or two seconds  
22 or three or four seconds, and I noted that the plaintiffs were  
23 cross-examined with that evidence. It appeared to be that it  
24 was more of an inconsistency, as counsel said, rather than an  
25 attempt to misstate the facts.

## PROCEEDINGS

1 And, so, I'm going to -- I think what I will do is say,  
2 "The evidence that a witness" -- and what was counsel's?

3 **MR. WOZNIAK:** "Made inconsistent prior statements."

4 **THE COURT:** -- "made inconsistent prior statements."  
5 That really reflects more what happened.

6 So the plaintiff agrees with that and the defendant  
7 objects?

8 **MR. QUINN:** We object? Yeah, we objected initially,  
9 but if that's your ruling.

10 **THE COURT:** Well, I mean, are you satisfied with it or  
11 not?

12 **MR. QUINN:** Yeah. That's fine.

13 **THE COURT:** All right. Then both parties are  
14 satisfied. That's it.

15 Duty to Deliberate?

16 **MR. WOZNIAK:** Good.

17 **MR. QUINN:** That's fine.

18 **THE COURT:** All right. 3.1A, I don't think -- I think  
19 we may have added. Is that in there? Do you have that in your  
20 package?

21 **MR. WOZNIAK:** Yes.

22 **MR. QUINN:** Yes.

23 **THE COURT:** Consideration of Evidence, Conduct of the  
24 Jury. Kind of straightforward.

25 **MR. WOZNIAK:** That's good.

## PROCEEDINGS

1           **MR. QUINN:** It's fine.

2           **THE COURT:** Communication with the Court.

3           Lisa, let me make sure that this is how you want to do it,  
4           too.

5                               (Pause in proceedings.)

6           **THE CLERK:** Yes, that's the standard instruction.

7           **THE COURT:** Standard. Thank you.

8           **THE CLERK:** And they have notes in there.

9           **THE COURT:** Good with 3.2?

10          **MR. WOZNIAK:** Yes.

11          **MR. QUINN:** Yes.

12          **THE COURT:** All right. Good?

13          **MR. QUINN:** Yes.

14          **THE COURT:** All right. 3.3, sort of standard, Return  
15          a Verdict.

16          **MR. WOZNIAK:** Good.

17          **THE COURT:** Good?

18          **MR. QUINN:** That's fine.

19          **THE COURT:** Okay. Damages Proof. We're going to have  
20          to talk about that, so let's put that to the side and we'll go  
21          through that afterwards.

22               Punitive Damages I'm sure we're going to be talking about,  
23          so we'll put that to the side.

24               Nominal Damages?

25          **MR. WOZNIAK:** We have some suggestions. Just --

## PROCEEDINGS

1           **THE COURT:** Well, why don't we put that to the side?

2           **MR. WOZNIAK:** Yes.

3           **THE COURT:** The Section 1983 claim, introductory  
4 instructions, 9.1 was submitted by the defendants and there was  
5 no objection.

6           **MR. WOZNIAK:** That's good.

7           **THE COURT:** Good?

8           **MR. QUINN:** It's fine.

9                               (Pause in proceedings.)

10          **THE COURT:** That's right, we have -- do we need in 9.1  
11 somehow say each plaintiff brings his claim under? I was just  
12 worried about that.

13          **MR. WOZNIAK:** The plaintiffs --

14          **THE COURT:** "The plaintiffs" makes it sound as though  
15 it's one block. You know, they might find that Mr. Huff  
16 doesn't meet his burden of proof; whereas, Mr. Cleveland does.

17          **MR. CUNNINGHAM:** Isn't that dealt with in another  
18 instruction?

19          **THE COURT:** We don't want contradictory -- who's  
20 arguing this?

21          **MR. WOZNIAK:** That was to me.

22          **MR. CUNNINGHAM:** I'm just whispering to him, Judge.

23          **THE COURT:** All right.

24          **MR. WOZNIAK:** I mean, within the damages there is talk  
25 about you can split it between the plaintiffs.

## PROCEEDINGS

1           **THE COURT:** Right.

2           **MR. WOZNIAK:** But, you know --

3           **THE COURT:** But that's different. If they come up  
4 with one dollar amount, they can apportion it amongst the  
5 plaintiffs; but what I'm saying is, if for some reason they  
6 don't believe Mr. Trask's testimony because of some of the  
7 issues of impeachment that were brought before them but  
8 believed Mr. Cleveland, shouldn't we have this tailored to more  
9 individual?

10           So let's put this to -- let's put 9.1 to the side and  
11 we'll talk about how to do that. All right?

12           **MR. WOZNIAK:** We agree to that right now if you want  
13 to just settle it.

14           **THE COURT:** All right.

15                           (Pause in proceedings.)

16           **THE COURT:** So shall we do, "Each plaintiff brings his  
17 claims under, dah, dah, dah, which provides that any person,  
18 et cetera, et cetera..."? Can we leave it with that? Does  
19 that work?

20           **MR. QUINN:** That's fine.

21           **MR. WOZNIAK:** That's fine.

22           **THE COURT:** Good?

23           **MR. WOZNIAK:** Yes.

24           **MR. QUINN:** Yes.

25           **THE COURT:** 9.2 submitted by the defendants,



## PROCEEDINGS

1 plaintiffs do not object, but I do have a note here. Given  
2 that the parties have stipulated to under color of law, how do  
3 they want to deal with the instruction?

4 **MR. QUINN:** For 9.2?

5 **THE COURT:** Yeah. It says if you stipulated to it,  
6 it's --

7 **MR. QUINN:** Strike it.

8 **THE COURT:** Well, it's an element.

9 **MR. QUINN:** So I'm not sure what you're asking.

10 **MR. WOZNIAK:** We can just put a little parenthetical  
11 in number one that, you know, element one has been stipulated  
12 to.

13 **THE COURT:** Or you can argue it at closing.

14 **MR. WOZNIAK:** Yeah.

15 **THE COURT:** I mean, you could say, "The element is  
16 that you acted under the color of law. We have stipulated to  
17 that."

18 **MR. WOZNIAK:** I mean, we'd suggest that it be added  
19 into the instruction.

20 **THE COURT:** What do you think?

21 **MR. QUINN:** I think our view is that it's not needed  
22 and it can be taken out, but given that we've stipulated to it.

23 **THE COURT:** I think it should stay in.

24 **MR. QUINN:** It's read to the jury as being stipulated  
25 to.

## PROCEEDINGS

1           **THE COURT:** Stipulated to, but it's --

2                           (Pause in proceedings.)

3           **THE COURT:** Oh, okay. All right. I note that I think  
4 we've already included that. I'm sorry. I didn't see this.

5 The second paragraph already says: (reading)

6           "The parties have stipulated that the defendants acted  
7 under color of law."

8           **MR. WOZNIAK:** And we did that in 9.3 as well. I see  
9 that.

10          **THE COURT:** Oh, okay.

11          **MR. WOZNIAK:** So 9.2 is good?

12          **THE COURT:** All right. And then it says here:  
13 (reading)

14          "However, if you find that the plaintiffs proved all  
15 the elements they are required to prove under the  
16 instructions found at pages..."

17          And that is -- that would be the 9.3; right? Is that what  
18 we -- I'm not quite sure what you have in mind.

19          **THE COURT:** We're thinking it should be the ones on  
20 page 29.

21          **THE LAW CLERK:** It should be page 29 and also the  
22 9.24, which is on page -- the pagination is going to change.

23          **THE COURT:** Pagination is going to change. But what  
24 we intended to do was that are required to prove -- oh, the  
25 reason I have this in here is because the instructions I give

## PROCEEDINGS

1 to the jury has none of the proposed closing instruction or any  
2 of the numbers. It only has the language. So, in other words,  
3 they'll need to know where to go, so we have to add the pages.

4 **MR. WOZNIAK:** Right.

5 **THE COURT:** All right?

6 **MR. QUINN:** Okay. I mean, I'm sure it will make  
7 sense.

8 **THE COURT:** What we'll do is just before we give them,  
9 I'll make sure that everybody's good with the page numbers.  
10 All right?

11 **MR. WOZNIAK:** But we agree it's going to reference 9.3  
12 and 9.24; is that it?

13 **THE COURT:** Yes.

14 **MR. WOZNIAK:** Okay.

15 **THE COURT:** All right?

16 **MR. QUINN:** We haven't agreed to 9.3 yet, but  
17 something that will appear in 9.3.

18 **THE COURT:** All right. 9.3.

19 (Pause in proceedings.)

20 **THE COURT:** A couple of questions that I have. In  
21 this paragraph right after four, starting "A person who acts  
22 under color of law," I assume that the parties want to then  
23 add, "The parties have stipulated that defendant acted under  
24 color of law."

25 **MR. QUINN:** Actually, I'd actually start from the

## PROCEEDINGS

1 beginning if we could.

2 **THE COURT:** All right.

3 **MR. QUINN:** You know, the plaintiffs, it's become  
4 clear that the claim is actually a failure-to-intervene claim.  
5 That's what was identified as a cognizable claim.

6 We would actually propose that this instruction be  
7 replaced with a different instruction focusing on the claim of  
8 failure to intervene rather than a supervisorial liability  
9 claim. We have proposed language.

10 **THE COURT:** Well, why don't the parties take a quick  
11 look at this which is underlined. Because a review of the law  
12 that we conducted in chambers indicates there is only a  
13 supervisory liability claim that can be based on several  
14 different acts, and I think that what we're looking at here is  
15 supervisory liability for failure to intervene.

16 **MR. WOZNIAK:** I mean, I think this instruction kind of  
17 connects the two things, connects what Abanico did and what  
18 Curry did.

19 **MR. QUINN:** And I think given the fact that from the  
20 beginning of the case the court's order of service indicated it  
21 was a failure-to-intervene claim, used that particular  
22 language, that the instruction can be more focused with regard  
23 to that particular language, that particular claim, and we can  
24 provide such a proposed instruction to the Court.

25 **THE COURT:** All right. "In order to prevail...."

## PROCEEDINGS

(Pause in proceedings.)

**THE COURT:** Well, would it work, "Defendant knew or reasonably should have known that a subordinate was engaging in these acts and that his conduct would deprive the plaintiff," and then, four, the defendant -- the primary one is, "The defendant failed to act to prevent a subordinate from engaging in such conduct."

**MR. QUINN:** Can I just read you our competing language?

**THE COURT:** Do we have that already?

**MR. QUINN:** I can provide it to you.

**THE COURT:** Why don't you -- yeah, why don't you just -- does counsel have a copy?

**MR. QUINN:** Counsel, here you go.

**THE COURT:** All right. Why --

**MR. WOZNIAK:** Is this from the model....

(Counsel conferring.)

**THE COURT:** And you want this in rather than --

**MR. QUINN:** Rather than the current proposed 9.3.

**THE COURT:** Can I take this out?

**MR. QUINN:** Yes.

**THE COURT:** We'll take a look at this and we'll come back to it because I want to take a look at this.

**MR. WOZNIAK:** It would be the plaintiffs' wish that we stay with 9.3.

## PROCEEDINGS

1           **THE COURT:** All right. We'll see.

2                           (Pause in proceedings.)

3           **THE COURT:** All right. What's next? Let's see, 9.8?

4           **MR. WOZNIAK:** Good.

5           **THE COURT:** We changed it a little bit, "In order to  
6 establish the acts of Defendant Abanico and the failure to act  
7 of Defendant Curry...."

8           **MR. QUINN:** We would just say "failure to intervene" I  
9 believe. We would replace "act" with "intervene" in the first  
10 line and in the middle of the fourth line.

11           **THE COURT:** That probably reflects the testimony more  
12 than anything.

13           **MR. WOZNIAK:** The word "intervene"?

14           **THE COURT:** Yeah.

15           **MR. WOZNIAK:** Okay.

16           **THE COURT:** Agree?

17           **MR. WOZNIAK:** Agree.

18           **THE COURT:** All right. As to line 1, "... Abanico and  
19 the failure to intervene by Defendant Curry..."

20           **MR. WOZNIAK:** So "act of" is taken out, "intervene  
21 by"?

22           **THE COURT:** Yeah, "intervene by." And then the  
23 second-to-the-last line, "and Curry's failure to intervene."

24           Agreed?

25           **MR. WOZNIAK:** Agreed.

## PROCEEDINGS

1           **MR. QUINN:** That's fine.

2           **THE COURT:** All right. In particular,  
3 Rights/Retaliation, I'm sure we're probably going to want to  
4 talk about those; right?

5           **MR. QUINN:** The retaliation should be taken out.  
6 There's no retaliation.

7           **THE COURT:** Right.

8           **MR. QUINN:** And the First Amendment.

9           **THE COURT:** I'm not sure why we have these in here.

10          **MR. WOZNIAK:** We were thinking everything was gone.

11          **MR. LEWIS:** They're old, Your Honor.

12                   (Pause in proceedings.)

13          **THE COURT:** Oh, okay. All right. I see. We're in, I  
14 think, manifestation five or six of these jury instructions by  
15 now. So you have to excuse us.

16          **THE LAW CLERK:** We have 35 next.

17          **THE COURT:** All right. So page 35.  
18 Never mind. This is all --

19          **MR. WOZNIAK:** So everything from 31 to 34 is out?

20          **THE COURT:** Is out, right.

21          **MR. WOZNIAK:** Okay.

22          **THE COURT:** We've killed a lot of trees in the last  
23 couple of days.

24           All right. 9.4, Particular Rights, Eighth Amendment  
25 Convicted, "A person who's claiming excessive force..."

## PROCEEDINGS

1 Plaintiffs object?

2 **MR. WOZNIAK:** The plaintiffs -- just a couple of  
3 suggestions. In the title to take out "excessive" and put in  
4 "wrongful force" because I don't think there's been a lot of  
5 discussion about "excessive force." And I think "wrongful"  
6 kind of couches what has gone on here a lot more.

7 **MR. QUINN:** I don't think anyone has referred to  
8 anything, to my recollection, as "wrongful force."

9 **THE COURT:** I think the statute talks about "excessive  
10 force"; doesn't it?

11 **MR. QUINN:** I'll be honest with you, we had a  
12 conversation about this --

13 **THE LAW CLERK:** The titles aren't going to the jury.

14 **THE COURT:** Oh, that's right. The titles aren't going  
15 to the jury, so it really doesn't make a difference.

16 **MR. QUINN:** Okay.

17 **MR. WOZNIAK:** All right.

18 **THE COURT:** I forgot about that.

19 **MR. WOZNIAK:** Thanks.

20 The other -- and number two, you know, we've got the  
21 bracket with the highlight. We just suggest that that  
22 language, "sexual assault by itself satisfies this prong," be  
23 added into number two.

24 **MR. QUINN:** I took the language -- the language in the  
25 first line is taken right from case law.



## PROCEEDINGS

1           **THE COURT:** Which one?

2           **MR. WOZNIAK:** Which first line?

3           **MR. QUINN:** The first line of subsection 2 there,  
4 "Defendant acted maliciously and sadistically for the purpose  
5 of causing harm." That's sufficient.

6           **THE COURT:** I'm not going to put that in. You can  
7 argue that.

8           **MR. WOZNIAK:** Okay. I mean, that's from the *Wood*  
9 case.

10          **THE COURT:** I understand that.

11          **MR. WOZNIAK:** Okay.

12          **THE COURT:** We looked at it this morning, but I'm just  
13 going to allow at this time just "maliciously and sadistically  
14 for the purpose of causing harm," and you can talk -- you can  
15 argue that at trial, the sexual assault.

16          **MR. WOZNIAK:** I'm just worried that the jury won't  
17 know that sexual assault by itself would satisfy that prong and  
18 that they would be determining whether it was malicious and  
19 sadistic as opposed to sexual.

20          **THE COURT:** Let me think about it.

21          **MR. WOZNIAK:** Okay. There's a few additional ones.  
22 1.13.

23          **MR. QUINN:** Yeah.

24          **THE COURT:** Yeah. Did you guys get those? So they  
25 have everything?

## PROCEEDINGS

1           Okay. No transcript available. I don't give a transcript  
2 to the jury.

3           **MR. WOZNIAK:** Good.

4           **THE COURT:** If they have a question, they have to come  
5 in and ask.

6           And then -- you did dailies; didn't you?

7           **THE REPORTER:** Yes.

8           **THE COURT:** So how do we do this? If they say, "Well,  
9 we can't remember if, you know, Curry said X or Y," and the  
10 parties ask to have it read back, are you going to come back?

11          **THE REPORTER:** Yes.

12          **THE COURT:** All right. 1.13 okay?

13          **MR. WOZNIAK:** Yes.

14          **THE COURT:** Deposition in Lieu of Live Testimony?

15          **MR. WOZNIAK:** Good with us.

16          **THE COURT:** Okay. So it would be the deposition of is  
17 it Benjamin or Ben?

18          **MR. QUINN:** I honestly don't know what he's going by.  
19 It's Benjamin.

20          **THE COURT:** Benjamin Curry.

21          **MR. WOZNIAK:** Why don't you bring him in and we can  
22 ask him?

23          **THE COURT:** What was the date?

24          **MR. QUINN:** I can get it. Hang on.

25          **THE COURT:** Actually, hold on for a second.

## PROCEEDINGS

1           **MR. QUINN:** January 29th, 2010.

2           **THE COURT:** January 29th, 2010. I want to take a look  
3 at something very quickly.

4                               (Pause in proceedings.)

5           **THE COURT:** Okay. All right. So 2.4 good, Deposition  
6 in Lieu of Live Testimony?

7           **MR. WOZNIAK:** And we're keeping all the bracketed  
8 phrases in as well?

9                               (Pause in proceedings.)

10          **THE COURT:** Question and answers... "When a person is  
11 unavailable to testify at trial, the deposition will be used at  
12 trial."

13          **MR. QUINN:** That's fine.

14          **THE COURT:** Okay.

15          **THE LAW CLERK:** Do we have a date on that?

16          **THE COURT:** Yes. We already got it.

17          And then do we also want to put, "Do not put any  
18 significance on the behavior"?

19          **MR. QUINN:** That's fine.

20          **MR. WOZNIAK:** Yes.

21          **THE COURT:** All right. Good.

22          **THE LAW CLERK:** 2.8 is a duplicate. That's my fault.

23          **THE COURT:** 2.8 is a duplicate of which?

24          **THE LAW CLERK:** Of 2.8 that was already --

25          **THE COURT:** Oh, all right.

## PROCEEDINGS

1           **THE LAW CLERK:** And then you want to look at the 1.7.

2           **THE COURT:** Oh, that's right. I have a couple here  
3 that I was wondering if we should add I was thinking of, which  
4 are not in the Ninth Circuit but in the Seventh Circuit:

5 (reading)

6           "No Inferences from Judge's Questions. During this  
7 trial, I have asked a witness a question myself. Do not  
8 assume that because I asked questions, I hold any opinion  
9 on the matter I asked about or on what the outcome of the  
10 case should be."

11          **MR. WOZNIAK:** No objection.

12          **MR. QUINN:** That's fine.

13          **THE COURT:** Okay. And then I guess we had  
14 demonstrative exhibits; didn't we? I mean, the fact that they  
15 did -- both sides -- well, you did two.

16                       (Pause in proceedings.)

17          **THE COURT:** It goes: (reading)

18          "Certain," and then it says, "describe the  
19 demonstrative exhibit, have been shown to you. Those,"  
20 again, short description, "are used for convenience and to  
21 help explain the facts of the case. They are not evidence  
22 or proof of any facts."

23          How should we -- what do you want to describe those as,  
24 "certain demonstrations"? "Certain demonstrations of search  
25 procedures"?

## PROCEEDINGS

1           **MR. WOZNIAK:** How about "simulated clothed body  
2 searches."

3           **MR. QUINN:** I would just --

4           **THE COURT:** Let's not lawyer it up. Let's keep it  
5 simple.

6           **MR. QUINN:** The language you had -- the language you  
7 had just said, which I can't recite as I'm standing here,  
8 sounded accurate.

9           **THE COURT:** So what did I say?

10                           (Pause in proceedings.)

11           **THE COURT:** Okay. "Certain demonstration of search  
12 procedures." How's that? Good?

13           **MR. QUINN:** That's fine.

14           **MR. WOZNIAK:** I guess I was thinking "certain" versus  
15 "various," but that's fine.

16                           (Pause in proceedings.)

17           **THE COURT:** Good?

18           **MR. WOZNIAK:** Good.

19           **THE COURT:** Good?

20           **MR. QUINN:** That's fine.

21           **THE COURT:** All right. And then a final one....

22                           (Pause in proceedings.)

23           **THE COURT:** There are no dismissed or withdrawn  
24 defendants; are there? It remains the two defendants.

25           **MR. QUINN:** No dismissed or withdrawn defendants? I

## PROCEEDINGS

1 mean, the case was filed in '07, and I don't know if there  
2 were --

3 **THE COURT:** No, no. What's before the jury.

4 **MR. QUINN:** Oh. No.

5 **THE COURT:** No, no. I mean the operative Complaint,  
6 the First Amended Complaint, only refers to these two, to  
7 Benjamin Curry and Correctional Officer Abanico.

8 **MR. WOZNIAK:** I believe that's correct.

9 **MR. QUINN:** It does name several John Does and it  
10 refers to a CO JA.

11 **MR. CUNNINGHAM:** The John Does are out at this point.

12 **THE COURT:** Yeah. I don't think I'm going to give  
13 that.

14 What about Multiple Claims, Multiple Plaintiffs? That's  
15 probably something that we should think about: (reading)

16 "You must give" --

17 **THE LAW CLERK:** We have that multiple parties  
18 instruction.

19 **THE COURT:** What? Do we have a multiple parties  
20 instruction? Where is that? Did I miss -- did I already talk  
21 about it?

22 **MR. WOZNIAK:** That's my recollection.

23 **THE COURT:** Okay. I will stop talking, then, at this  
24 juncture.

25 **THE LAW CLERK:** You have 1.5, Two or More Legal

## PROCEEDINGS

1 Parties.

2 **THE COURT:** All right. Fine. Let me give you these.

3 And, so, then we'll also do no inferences from judges and  
4 demonstrative evidence.

5 (Pause in proceedings.)

6 **THE COURT:** All right. Let's....

7 (Pause in proceedings.)

8 **THE COURT:** I guess we go back and start off with  
9 Claims and Defenses. Now, what is it that's remaining to be  
10 argued here?

11 **MR. QUINN:** Just I think with regard to the last line  
12 about how we argue -- defendants argue that they're entitled to  
13 qualified immunity, and we would argue that that should be kept  
14 here. It's an appropriate -- it's appropriate language for  
15 this instruction.

16 We'd also like to add an instruction, a separate  
17 instruction, for the qualified immunity standard because we  
18 don't -- we've had a fair amount of testimony about how -- how  
19 officers are trained to conduct these searches and how  
20 Officer Abanico was just doing his job, testimony to that  
21 effect; and given that testimony, that the qualified immunity  
22 standard should at least be presented to the jury for them to  
23 consider.

24 **MR. WOZNIAK:** We object and we request that that be  
25 taken out. I mean, it's clear that the testimony here shows

## PROCEEDINGS

1 that what he was doing was outside of -- at least the  
2 allegation is that what he was doing was outside of his job  
3 and, you know.

4 (Pause in proceedings.)

5 **THE COURT:** You know --

6 **MR. WOZNIAK:** And if the conduct --

7 **THE COURT:** Wait a minute. Hold on.

8 Lieutenant, and I can't remember his --

9 **MR. QUINN:** Stoltenberg.

10 **THE COURT:** -- Stoltenberg I think was pretty clear.  
11 And correct me if I'm wrong, and I'm not saying whether your  
12 client did this or not, but if, in fact, there was pinching and  
13 grabbing of the penis and the scrotum as testified to by these  
14 plaintiffs, then that was completely out of the realm of what a  
15 search should have been. Am I right or wrong?

16 I mean --

17 **MR. QUINN:** I think what you've characterized is  
18 something that would be outside of the guidelines or the  
19 regulations, the procedures; but the jury should have that  
20 instruction at least to consider if they believe that he was  
21 following the regulations.

22 **THE COURT:** So what you're saying is they would have  
23 to make a two-step analysis. First they would have to not  
24 believe plaintiffs' testimony that they were pinched and  
25 grabbed, and that the remainder of the Defendant Abanico's



## PROCEEDINGS

1 conduct was within the guidelines as outlined by Lieutenant  
2 Stoltenberg and I think to some extent confirmed by  
3 Warden Curry.

4 There's a cupping issue that still remains, but it sounds  
5 to me like the guidelines indicate there was supposed to be a  
6 certain amount of cupping for contraband.

7 **MR. WOZNIAK:** I think it was cupping.

8 **MR. QUINN:** So if --

9 **THE COURT:** Hold on.

10 **MR. QUINN:** If the jury finds that Officer Abanico was  
11 conducting himself in accordance with those procedures during  
12 these searches, cupping the groin and doing the other things  
13 that have been described both by the witnesses, and in the  
14 stipulated facts I think we have some language regarding what's  
15 required, that the jury should have that option to consider the  
16 qualified immunity defense.

17 **MR. WOZNIAK:** If the jury doesn't believe what the  
18 guide said, the case is over. I mean, there's no need to find  
19 qualified immunity at that point.

20 And if there's a dispute about what happened, I mean, if  
21 we were just talking about cupping and these guys were bringing  
22 suit against cupping and it was clear that cupping was what he  
23 was talking about, we're saying that's unconstitutional, I  
24 think that would be correct.

25 But there's a dispute here about the facts about what

## PROCEEDINGS

1 happened, and that takes it outside of that. If the jury --  
2 if, indeed, what the plaintiffs are alleging in terms of the  
3 squeezing and grabbing, there's no way that the defendant would  
4 have thought that what he was doing was lawful.

5 **THE COURT:** So the argument is, let me make sure I'm  
6 clear, is that if they find that your client did not pinch or  
7 squeeze the scrotum, then they have no claim at all. So why  
8 would we need qualified immunity?

9 **MR. QUINN:** I guess there's a potential for --

10 **THE COURT:** I mean, can't you argue to the jury --

11 **MR. QUINN:** -- the distinction between --

12 **THE COURT:** -- can't you just argue, "Look, ladies and  
13 gentlemen, if our client, if Correctional Officer Abanico did  
14 not squeeze or pinch the scrotum or the penis, then he followed  
15 the guidelines and has done nothing wrong"?

16 **MR. QUINN:** I anticipate we will make that argument.

17 **THE COURT:** I'm sure it's going to ring through the  
18 hallways, but....

19 (Pause in proceedings.)

20 **MR. WOZNIAK:** I guess they get two bites if they get  
21 the qualified immunity instruction, and that's just not....

22 **MR. QUINN:** I guess there's -- the argument would be  
23 if the cupping also -- during the cupping, during the act of  
24 cupping there was some sort of a pinch or a squeeze, but it was  
25 in the course of --

## PROCEEDINGS

1           **THE COURT:** If they find that, then from what I  
2 understood from the testimony of the lieutenant, that's not  
3 proper. Maybe I'm wrong. I mean, but it struck me that from  
4 what I heard from the lieutenant and, in fact, the big bold  
5 line -- what was boldly written again?

6           **MR. WOZNIAK:** "Do not squeeze the inmate's scrotum."

7           **THE COURT:** Yes, "Do not squeeze the inmate's  
8 scrotum."

9           Did you already provide the --

10          **MR. QUINN:** We hadn't provided it in our initial --

11          **THE COURT:** Why don't you give me that? I'm going to  
12 think about that a little bit. Okay?

13          Have you shown the other side the qualified --

14                               (Pause in proceedings.)

15          **THE COURT:** Why don't you give me that?

16          **MR. QUINN:** Actually, I think you already -- the  
17 packet we previously gave probably has it.

18          **THE COURT:** Let me just take that.

19          Okay. I'm going to take the -- oh, here. No, I have it.  
20 You're right. I have it already. I have your damages and your  
21 qualified immunity are the other two.

22          All right. I'm going to put these -- thank you, Lisa --  
23 I'm going to put these to the side and then I'm going to take  
24 one more look at them in chambers. I want to take a look at  
25 some case law before I....

## PROCEEDINGS

(Pause in proceedings.)

**THE COURT:** All right. Then what --

**MR. WOZNIAK:** Judge, I can just -- I don't have a specific cite, but there's a *Schenk* [sic], S-C-H-E-N-K [sic], case, that deals with sexual contact as being outside of qualified immunity.

**MR. CUNNINGHAM:** It's cited in these notes.

**MR. WOZNIAK:** We might be able to get you a cite.

**THE COURT:** All right. Give me a cite. I'll take a look at it.

1.8, Evidence for a Limited Purpose. Let's go over that one.

**MR. QUINN:** I don't recall, to be honest, whether there was some ruling that some evidence or some discussion about the evidence being submitted for a limited purpose.

**THE COURT:** I don't believe I indicated that there was anything that was --

**MR. WOZNIAK:** I don't think there is.

**THE COURT:** All right. Why don't we -- then both parties agree this does not need to be given to the jurors?

**MR. WOZNIAK:** Agreed.

**MR. QUINN:** Agreed.

**THE COURT:** All right. Then I'm going to....

(Pause in proceedings.)

**MR. WOZNIAK:** Here, Judge. I have the cite for you on

## PROCEEDINGS

1 the *Schwenk* case. Are you ready? It's 204 F.3d 1187.

2 **THE COURT:** 1187. And it's *Schwenk*?

3 **MR. WOZNIAK:** It's S-C-H-W-E-N-K.

4 **THE COURT:** *Schwenk*.

5 **MR. WOZNIAK:** *Schwenk v. Hartford*. And I can direct  
6 you --

7 **THE COURT:** Okay, 204 Fed. 3d.

8 All right. Now, we've got two -- we have 5.1, Damages  
9 Proof, and then Defendants' Damages - Physical Injury required;  
10 correct?

11 **MR. QUINN:** Our proposed physical.

12 **THE COURT:** Your proposed.

13 (Pause in proceedings.)

14 **THE COURT:** All right. Where are we? Let's see, so  
15 we're going to take a look at your damages and then we'll go on  
16 with the damage instructions. I think that's -- I think that  
17 really is -- the rest revolves on how we're going to do the  
18 damages; right?

19 **MR. WOZNIAK:** Well, and the 9.24 instruction.

20 **THE COURT:** Didn't we already talk about that?

21 **MR. WOZNIAK:** They're suggesting a different  
22 instruction.

23 **THE COURT:** Oh, all right. All right.

24 **MR. QUINN:** Oh, yeah.

25 **THE COURT:** All right. Why don't I take a brief

## PROCEEDINGS

1 recess? I'm going to go back and take a look at those cases  
2 counsel cited and the arguments, and then I'll come back and  
3 talk about it. All right?

4 **MR. CUNNINGHAM:** Judge, you also have the case that's  
5 in these comments here right toward the end, that *Wood versus*  
6 *Beauclair*.

7 **THE COURT:** I think I read from it?

8 **MR. CUNNINGHAM:** Yes. Where --

9 **THE COURT:** All right. Let me take a look.

10 **MR. CUNNINGHAM:** All right. Sexual actions --

11 **THE COURT:** Let me take a look at it.

12 **MR. CUNNINGHAM:** -- in and of themselves.

13 **THE COURT:** All right.

14 (Recess taken at 2:20 p.m.)

15 (Proceedings resumed at 4:38 p.m.)

16 (Proceedings were heard out of the presence of the jury:)

17 **THE COURT:** All right. We have the instructions that  
18 my clerk has given you are the ones I intend to give tomorrow.

19 Starting off with qualified immunity, qualified immunity  
20 isn't appropriate here. The defendants have not alleged that  
21 there was a constitutional violation conducted by Abanico and,  
22 therefore, you haven't satisfied the first prong of qualified  
23 immunity.

24 You first have to say he did something wrong but then,  
25 therefore, he has immunity. What do you allege that he did

## PROCEEDINGS

1 wrong?

2           **MR. QUINN:** I understand. We'll -- we're not -- we're  
3 alleging that he did everything --

4           **THE COURT:** Right.

5           **MR. QUINN:** -- to the contrary, properly. So that's  
6 fine. We'll withdraw it.

7           **THE COURT:** Physical Damage -- Physical Injury  
8 Required - De minimis Injury Insufficient is not the Court's  
9 reading of the *Wood* case. That will be denied.

10           The claim of failure to intervene as presented by the  
11 defendants, *Robbins versus Meecham*, *Cunningham versus Gates*,  
12 both cases can be distinguished. Neither case is on point.  
13 Both cases refer to parties who had a duty to intercede; in  
14 other words, one officer observes another officer hitting  
15 somebody and stands there and does nothing.

16           This is a case of failure to intervene on the part of  
17 Curry; and, therefore, the modified jury instructions that the  
18 Court intends to give regarding Defendant Curry, we believe,  
19 are appropriate and that would be the supervisory liability  
20 claim specifically regarding the failure to intervene.

21           And, therefore, I think that's all that was -- we prepared  
22 the damage instructions to coincide with the 1983 claims as we  
23 have drafted them.

24           Finally, the verdict that we have also then follows the  
25 jury instructions as we prepared them.

## PROCEEDINGS

1       Now, what I'm going to do is, it's late, I have staff  
2       here, it's already 4:42, so I'm going to allow the parties to  
3       take the final jury instructions home, final verdict back, and  
4       please be prepared to succinctly argue any objections you have  
5       or comments first thing tomorrow morning before the jury comes  
6       in. All right?

7               **MR. CUNNINGHAM:** 8:30?

8               **THE CLERK:** What time?

9               **THE COURT:** 8:30 is all right with you?

10              **THE CLERK:** 8:30.

11              **THE COURT:** 8:30.

12              **MR. LEWIS:** Yes, Your Honor, one question. We haven't  
13       moved exhibits in yet. Do you want to do that tomorrow  
14       morning?

15              **THE COURT:** Yes.

16              What do you want to do, Lisa? Do you want to do that now  
17       or do you want --

18              **THE CLERK:** We can do it in the morning.

19              **THE COURT:** Okay. We'll do it in the morning.

20              **MR. LEWIS:** All right, Judge.

21              **THE COURT:** All right. Thank you.

22              **MR. CUNNINGHAM:** All right. Thank you, Your Honor.

23                       (Proceedings adjourned at 4:42 p.m.)

24                               ---oOo---


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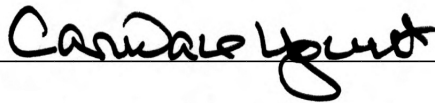
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2  
3                   CERTIFICATE OF REPORTERS

4               I certify that the foregoing is a correct transcript  
5 from the record of proceedings in the above-entitled matter.  
6

7   DATE:     Wednesday, November 6, 2013  
8  
9

10  
11                   

12                   Jo Ann Bryce, CSR No. 3321, RMR, CRR  
13                   U.S. Court Reporter

14                   

15                   Candace L. Yount, CSR No. 2737, RMR, FCRR  
16                   U.S. Court Reporter  
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